Supreme Court, U.S.
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No. 99-_____

In the
Supreme Court of the United States

IN RE MILK PRODUCTS ANTITRUST LITIGATION

RAINY LAKE ONE STOP, INC.; HOFFMAN CORNER OIL CO.; THOMAS DECAIGNY, d/b/a DeGaigny Grocery; and STAN DENNE, d/b/a Denne's Market & Roseville Superette,

Petitioners,

v.

MARIGOLD FOODS, INC.
LAND O'LAKES, INC.
BOLSWESSANEN U.S.A. INC.
MEYER BROS. DAIRY, INC.
OAK GROVE DAIRY, INC.
K&P COMPANY, INC.
MARIGOLD VENTURE, INC.
COUNTRY LAKE FOODS, INC.
BOLSWESSANEN HOLDING, INC.
GEO. BENZ & SONS INC.
SCHROEDER BROTHERS, INC.
JOHN DOE, RICHARD DOE & XYZ CORPORATION

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the court of appeals improperly apply Deposit Guaranty Nat'l Bank v. Roper, 445 U.S. 326 (1980) in holding that an antitrust plaintiff in a horizontal price-fixing conspiracy class action forever loses its "stake" in pending litigation when partial judgment is entered in favor of a defendant from which the plaintiff exclusively purchased?

2. Does the court of appeals' holding that state law governs the question of whether federal antitrust standing exists for purchaser of a price-fixed product that subsequently sells certain business assets but not expressly its Sherman Act claim, directly conflict with Sullivan v. National Football League, 34 F.3d 1091 (1st Cir. 1994) and Gulfstream III Associates, Inc. v. Gulfstream Aerospace Corp., 995 F.2d 425 (3d Cir. 1993), cases holding that federal law, which requires an express assignment, controls?

3. Does the court of appeals' holding that a convenience store that purchases a price-fixed commodity product is not typical of a larger-store purchaser of the same product, directly conflict with this Court's decision in Reiter v. Sonotone Corp., 442 U.S. 330 (1979), which held that any purchaser of a price-fixed product in a horizontal price-fixing conspiracy is "injured" under the Sherman Act and that any such purchaser, consequently, is a typical purchaser?

4. Does the court of appeals' decision conflict with this Court's decision in Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690 (1962) in that the courts below compartmentalized the case into discrete units by failing to consider Petitioners' horizontal price-fixing conspiracy case as a whole?

5. Did the court of appeals err in placing reliance on Klehr v. A.O. Smith Corp., 521 U.S. 179 (1997), a case limited on its face to fraudulent concealment in civil RICO actions, and establishing an impossible pleading standard for fraudulent concealment in a horizontal price-fixing conspiracy case, especially where the plaintiffs pleaded multiple affirmative acts of concealment and that their due diligence failed to uncover the conspiracy?

6. Did the court of appeals violate the Seventh Amendment of the United States Constitution by making its own findings of fact on questions within the province of a jury?

PARTIES TO THE PROCEEDINGS

The following individuals and companies were plaintiffs/appellants in the court of appeals and are Petitioners in this Court:

Rainy Lake One Stop, Inc.;
Hoffman Corner Oil Co.;
Thomas Decaigny, d/b/a DeCaigny Grocery; and,
Stan Denne, d/b/a Denne's Market & Roseville Superette;

No Petitioner has a parent or subsidiary company. Petitioner Hoffman Corner Oil Co. is owned exclusively by Lloyd Urban. Petitioner Rainy Lake One Stop, Inc. was formerly owned by Lawrence and Nancy Rognerud.

The following companies were defendants/appellees and are Respondents in this Court:

Marigold Foods, Inc.;
Marigold Venture, Inc.;
Land O'Lakes, Inc.;
BolsWessanen U.S.A. Inc.;
BolsWessanen Holding, Inc.;
Meyer Bros. Dairy, Inc.;
Oak Grove Dairy, Inc.;
K&P Company, Inc.; d/b/a Polka Dot Dairy Inc.;
Country Lake Foods, Inc.;
Geo. Benz & Sons, Inc. d/b/a Oak Grove Dairies
Oak Grove Dairies, Inc. d/b/a Oak Grove Dairies
Schroeder Brothers, Inc.;
John Doe, Richard Doe; and,
XYZ Corporation.

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INTRODUCTION

Petitioners Rainy Lake One Stop, Inc., Hoffman Corner Oil Co., Thomas DeCaigny, d/b/a DeCaigny Grocery, and Stan Denne, d/b/a Denne's Market & Roseville Superette, respectfully petition this Court for a Writ of Certiorari to review the judgment and opinion that the United States Court of Appeals for the Eighth Circuit entered in this proceeding on November 15, 1999.

STATEMENT OF THE CASE

I. Nature of the Case.

Armed with a detailed, under-oath admission of a high-ranking executive of the largest Minnesota-based fluid milk processor regarding a decade-long practice of fixing the price of fluid milk, a per se violation of the antitrust laws of the United States, Petitioners brought this class action antitrust suit. The allegations of the conspiracy are based upon the sworn statements of John Doyle, a former executive of Respondent Marigold Foods, Inc., to whom the United States Department of Justice granted immunity, and who directly participated in the conspiracy and accepted "hush money" from Marigold Foods in return for his agreement to conceal the conspiracy. The "hush money" contract was signed in 1990 and extended at least until January 31, 1994. Despite Petitioners' strong evidence of antitrust liability and Respondents' attempts to conceal the price-fixing conspiracy, the district court dismissed the case on various procedural grounds based on the pleadings. No merits discovery was allowed and the district court denied repeated requests for such merits discovery that would bear directly on the issue of concealment.

Petitioners alleged a horizontal antitrust conspiracy among Respondents to raise, stabilize and fix the prices of fluid milk in the geographic area covered by the Upper Midwest Marketing Order ("FMO 68"), which includes nearly all of Minnesota and portions of North and South Dakota, Iowa and Wisconsin.[2] Respondents are Marigold Foods, Inc.; Marigold Venture, Inc. (collectively "Marigold); BolsWessanen Holdings, Inc.; BolsWessanen U.S.A., Inc.; Land O'Lakes, Inc. and its internal unit Country Lake Foods, Inc., Meyer Brothers Dairy, Inc. ("Meyer"); Oak Grove Dairy, Inc. ("Oak Grove"); Schroeder Milk Co. ("Schroeder"); and K&P Company, Inc. ("K&P"). They and other unnamed co-conspirators are businesses that process, market and sell fluid milk throughout Minnesota and parts of surrounding states. Petitioners alleged that Respondents' unlawful conduct unreasonably restrained competition in the sale of fluid milk and forced Plaintiffs and members of the proposed class to pay higher prices for fluid milk than they would have paid in a competitive market.

II. Statement of Facts

A. Background

Petitioners are businesses that directly purchased milk from Respondents for sale to the general public. The Second Amended Complaint alleged that, from 1985 through at least

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[2] Petitioners eventually sought class certification limited only to purchasers of fluid milk within the parts of Minnesota covered by Federal Milk Marketing Order 68. (A-323-34). All but a few Minnesota counties in the southern part of the state fall within FMO 68. For a description of federal milk regulation through marketing orders under the Agricultural Marketing Agreement Act of 1937, 7 U.S.C. § 601 *et seq.*, see Minnesota Milk Producers Ass'n v. Glickman, 153 F.3d 632 (8th Cir. 1998), cert. denied sub nom. Texas Ass'n of Dairymen v. Minnesota Milk producers Ass'n, 119 S. Ct. 1803 (1999).

1995, Respondents and other co-conspirators entered into a combination and conspiracy to fix, raise, and stabilize the price of fluid milk sold to grocery stores, convenience stores, and other direct purchasers of fluid milk for resale to the general public. (Comp. ¶¶ 43, 85; A-38-47.) Respondents' conspiracy controlled virtually every point of pricing in the distribution chain of fluid milk to Petitioners and members of the proposed class and, if proved, would be a per se violation of the antitrust laws of the United States.

Respondents amongst themselves unlawfully discussed, determined and agreed on the price they would charge to Petitioners and the members of the proposed class. (Id. ¶¶ 46, 47; A-37-38.) To expand and broaden the conspiracy, Respondents allocated customers among themselves and refused to compete for other Respondents' customers. (Id. ¶¶ 54, 55; A-39.) Respondents traded evolving markets and customers among themselves to maintain the equilibrium of the conspiracy. (Id. ¶¶ 65, 66; A-41-42.) Respondents' combination and conspiracy resulted in direct purchasers of fluid milk paying higher prices than otherwise would have been available in an open competitive market. (Id. ¶¶ 86-91; A-47-48.)

B. The Doyle Statements

The factual information underlying Petitioners' claims of a price-fixing scheme in the upper Midwest milk industry comes from a self-confessed informant, director and a major participant in the conspiracy. The informant, John Doyle, was associated with Marigold as an executive and consultant during the period of 1979 through 1994. (Doyle I at 3-4; A-

334-335.)[3] Doyle first met with one of Petitioners' counsel at the office of Doyle's attorney sometime in early May 1996 to discuss the "fixing, raising, maintaining, stabilizing the price of milk products sold to various outlets such as grocery stores, supermarkets and convenience stores." (Id. at 2-3; A-2-3.) Petitioners' initial complaint was based on information from this meeting and filed shortly thereafter. Since the initial meeting, Petitioners took another recorded statement from Doyle regarding the conspiracy. Both were submitted to the district court in these proceedings and are part of this record. Doyle gave his statements only after securing immunity from federal prosecution.

In both statements, Doyle described Respondents' price fixing agreements in great detail. First, the federal government issues a milk marketing order setting the minimum price that a buyer must pay for raw milk:

> The federal order, milk marketing order sets the class one price 30 days prior to when a supplier has to charge it and a buyer has to pay for it. It's established by the federal order and it begins with the class three price plus a class one differential and that's the class one price. All milk sold for class one, which is fluid milk that we are talking about, is sold at the class one price.

(Id. at 47; A-378.)

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[3] Two statements provided by John Doyle under oath are in the record. The first, taken May 29, 1996, shall be referred to as "Doyle I" and is found at A-332-419. The second, taken April 1, 1998, shall be referred to as "Doyle II" and is found at A-415-457.

Next, Doyle negotiated on behalf of Marigold the amount over the federal Order price that would be paid to suppliers ("over-order premium"). He then passed this information on to Marigold's competitors via either telephone conversations or face-to-face meetings for their agreement:

> . . . I was responsible in negotiating with the suppliers for the raw costs and then taking the raw cost changes would determine what an appropriate price level for a gallon or a half gallon of whole milk or 2 percent or skim, whatever it would be, and then subsequently talk to the competitors, Dairy Fresh, Land O'Lakes, Oak Grove to name three and also other members of Marigold's management and then they would I assume pass along to other people or whoever they would talk to that here was what the raw cost was going to be and here is what Marigold was going to have as a price and ask them if they wouldn't, if they didn't think that was an appropriate level.

(Id. at 7; A-338-39.) Once an over-order price was negotiated and agreed upon by the conspirators, the conspirators determined the wholesale price each would charge and as Doyle further states:

> Once it was determined what the overorder premium was, then you knew how much per gallon your raw cost would be and then the conversations would swing from what the raw cost is going to be as to how much the wholesale price was going to go down in May or June which it usually did or up in the fall. Those discussions took place between Marigold Foods, myself and people who we've talked about before at the Dairy Freshes when they

were by themselves and Land O'Lakes and . . . Polka Dot and Oak Grove and whomever the other suppliers were and what you would then, what would try do is if there is, you would try and pass along if you possibly could more than the raw cost was going up or in May you would try and pass along less than the raw cost is going down. You knew what you were going to pay for the raw material cost which is 85 or 90 percent of your cost of sales and a gallon of milk is what you pay for the raw material. And if you could pass along a little bit less, fractions of a cent, a quarter of a cent, a tenth of a cent, you could put a lot of money if you are bottling 3 million gallons as we were in the northern division you can see what fractions of a cent would be as far as profit and loss. But in order to do that, in order to not pass along more than what you were supposed to in order to make more money you had to talk to your competitors because of the cost of milk, a gallon of milk is uniform. If you were to sell to a major customer or any customer for that matter at a higher price than they could buy from your competitor, you either would have to meet the price immediately or you lose the account because the prices just equate immediately unless, so if there is anybody out there with a lower price or anybody out there with a higher price the price will always come down to the lowest denominator.

(Id. at 48-49; A-379-80.) Once the conspirators fixed the price, each conspirator issued price lists reflecting the agreed-

upon prices.[4] (Doyle II at 25; A-438.) These price lists were provided to customers and other conspirators alike. (Id. at 26; A-439.)

Doyle identified, among others, the following individuals, executives or employees as competitors who were involved in the price-fixing conspiracy:

> Lenny Farencheck and Al Grunts of Oak Grove Dairy (Doyle I at 22-23; A-353-54);
>
> Kip Campbell, Paul Christ, Tom Packard, Denny Tolifson of Land O'Lakes (Id. at 24-25, 36, 38; A-355-56, 367, 369);
>
> Dick Cook and Wally Petit of K&P (d/b/a Polka Dot) (Id. at 32-33; A-363-64);
>
> Bob Schroeder of Schroeder Brothers (Id. at 40; A-371); and
>
> Dick Meyer of Meyer Brothers (Doyle II at 10; A-423).

At Marigold, Doyle reported his conspiratorial acts and competitive information to Marigold employees Larry Gergens, Herb Hakes, Wally Gronholm, and Diane Chichi. (Doyle I at 26, 27, 29, 40; A-357, 358, 360, 371.)

If a conspirator tried to break ranks by varying from the agreed upon price, retaliation by the other conspirators was swift: "[Y]ou would meet it [the price] immediately and then you would call the guy and say if you do that again we are going to have a real serious problem. We are going to your big account with a dime off." (Id. at 53; A-384.) Threats of

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[4] Doyle further stated that the conspirators fixed the price of milk each month. (Id. at 7, 50-52; A-338, 381-83.) Each of these meetings and agreements would result in a new violation of federal antitrust laws, thereby resetting the applicable statute of limitations.

retaliation usually were sufficient to enforce the conspirators' pricing agreements. (Doyle II at 20-21; A-433-34.)

Doyle stated that he attended Marigold management meetings where the confidential milk pricing was discussed. (Id. at 31-32; A-444-45). At these meetings, Doyle would inform Marigold's division managers of the market order prices and the over-premium prices. (Id. at 32; A-445.) Although minutes of the meetings were kept, the minute taker was instructed to omit all discussions of the agreements made with competitors regarding the wholesale prices. (Id. at 36-37; A-449-50.) This action was taken to conceal the fixing of the wholesale prices. (Id. at 39; A-452.)

Doyle discussed additional precautions taken by the conspirators to conceal their price-fixing conspiracy:

> Well, it was always discussed, you know, amongst ourselves that any time you talked with a competitor it was on a one-to-one basis, and that you didn't, didn't take any notes or write anything down or keep track of it. You just, either on, by phone or in person, you met with somebody on a one-to-one basis.
>
> And it was always pointed out the risks that was [sic] being taken if it was ever discovered.
>
> And it was even said from time to time, don't tell me what you're doing because I don't want to know about it. I can remember that statement.

(Id. at 39; A-452.) Additionally, whenever they were asked about pricing, Defendants universally blamed increased wholesale prices on increases of the raw milk price.

In September 1991, Doyle became concerned about his role in what he knew was an illegal activity. (Doyle I at 9; A-340.) He approached Marigold president Dwight Holcombe

and vice president Larry Gergens and told them he was concerned about his "exposure from the standpoint of this price fixing and discussing with competitors what price levels would be and et cetera" and was leaving Marigold. (Id. at 9-10; A-340-41.) Holcombe later approached Doyle and asked what Doyle wanted. (Id. at 10; A-341.) Doyle outlined what he wanted and stated that he was contemplating going to the Justice Department. (Id. at 11; A-342.) Six weeks later, Doyle received a contract drafted by Marigold's attorneys and signed by Holcombe that contained most of Doyle's conditions in exchange for Doyle's agreement to remain silent and not go the Department of Justice with his confession. (Id.) Doyle worked at Marigold under the terms of the contract in a consultant capacity until 1994. (Id. at 11, 70; A-342, 401.) During this contract period, individuals from competitors continued to contact Doyle regarding fixing, raising and stabilizing prices for fluid milk. (Id. at 71; A-402.) After the contract expired in 1993, Doyle contacted the United States Department of Justice and divulged the price-fixing activities. (Id. at 14; A-345.) The last "hush money" payment under the contract was in January 1994.

III. Procedural History and District Court Disposition

This case has a lengthy procedural history. Petitioners filed a Complaint on May 20, 1996, days after Petitioners were made aware of Doyle's admissions, which he made only after being granted immunity from prosecution. Petitioners filed a First Amended and Consolidated Complaint July 1, 1996. (A-1-22.) Respondents separately answered the First Amended Complaint in mid-August 1996. At that time, Land O'Lakes filed a motion to dismiss the fraudulent concealment allegations of the First Amended Complaint. The district court issued a Pretrial Schedule that established deadlines for

amendments and adding parties by February 1, 1997, and a trial-ready date of October 1, 1998. (App. 1-4).

Thereafter on October 25, 1996, Land O'Lakes moved to dismiss Country Lakes Foods, its internal operating unit, on the basis that it had been dissolved more than three years prior to Petitioners' suit and, therefore, pursuant to Minnesota statutes, lacked the capacity to be sued.[5] Shortly thereafter, Schroeder, Marigold and BolsWessanen all moved to dismiss the First Amended Complaint.

Ruling from the bench (11/22/96 Tr. at 71-80; A-59-138), and confirming the oral ruling with a short December 26, 1996, order (App. 5-7), the district court granted Land O'Lakes' motion to dismiss the fraudulent concealment allegations in the First Amended Complaint, dismissed County Lakes Foods, dismissed Schroeder, denied the motions to dismiss or alternatively for summary judgment of BolsWessanen, and dismissed Marigold. (Id.) The court dismissed the First Amended Complaint without prejudice and allowed Petitioners until January 31, 1997, to file a second amended complaint.

Petitioners filed a Second Amended Complaint on January 31, 1997. (A-23-58.) By March 14, 1997, all Respondents had moved to dismiss the Second Amended Complaint and specifically its fraudulent concealment allegations. Thereafter, Petitioners moved to compel discovery of documents that Respondents had compiled in response to subpoenas from the Antitrust Division of the Department of Justice, documents, *inter alia*, regarding sales and pricing Respondents had already provided to the State of

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[5] Petitioners served discovery requests relevant to the issues raised by Land O'Lakes' motion, but Land O'Lakes refused to respond. Nonetheless, the district court granted its motion without written comment. (App. 22 - 28.)

Minnesota, and documents regarding economic data that Respondents provided to third parties as well as for ten depositions of key players in the conspiracy named by Doyle.

The district court issued an order on September 30, 1997, denying the dismissal motions of all Respondents except K&P, but dismissing Petitioners' fraudulent concealment allegations with prejudice. (App. 10-21.) The district court also denied Petitioners' motion to compel production of documents Respondents had previously produced to the grand jury, although it granted the motion in relation to the other documents requested. (App. 24-28.)

On October 23, 1997, the district court issued an Amended Pretrial Schedule. The schedule kept in place various dates *that had already passed*, including the February 1, 1997, date to add parties. (App. at 33-35.)

Pursuant to Federal Rule of Civil Procedure 54(b) and 28 U.S.C. § 1292, Petitioners moved the district court on November 4, 1997, for certification of its decisions on the dismissal of K&P and CLF and the dismissal with prejudice of the fraudulent concealment allegations as to all Respondents. Petitioners also requested permission to take limited merit-based depositions to preserve testimony of key senior executives, employees and former employees of Respondents identified in Doyle's admissions. The district court denied all these motions on December 19, 1997.

On February 9, 1998, the district court issued a Second Amended Pretrial Schedule. The order made minor date changes, but *the elapsed dates* such as the February 1, 1997, date for adding parties, remained unchanged. (App. 37-39.)

Petitioners moved for class certification pursuant to Federal Rule of Civil Procedure 23 on February 1, 1998. Petitioners also sought to add additional proposed class

representatives. (A-323-28.) The district court set a briefing schedule and specifically required Petitioners to move to amend their Complaint to add class representatives. (A-330-31.) Respondents also moved for partial summary judgment against certain named plaintiffs.

On April 27, 1998, Petitioners moved the court for permission to file a Third Amended Complaint to add several additional class representatives. The district court on June 26, 1998, considered motions for class certification and amendment of the complaint and Respondents' motion for partial summary judgment.

On July 14, 1998, the district court granted partial summary judgment and dismissed all of the named plaintiffs except Rainy Lake One Stop, Inc. ("Rainy Lake.") (App. at 43-47.) Petitioners Thomas DeCaigny, d/b/a DeCaigny Grocery; and Stan Denne, d/b/a Denne's Market and Roseville Superette were specifically dismissed.[6] (Id.) Petitioner Hoffman Corner Oil and Respondent K&P were previously dismissed. The district court, however, refused to allow Petitioners the opportunity to file a Third Amended Complaint to add new class representatives. The court held that Petitioners did not have good cause for failing to meet the requirements of Federal Rule of Civil Procedure 16. (App. 45-47.) As to class certification, the court determined that the one remaining plaintiff, Rainy Lake, lacked standing because its owner, in selling certain business assets, impliedly sold its antitrust claim as well. (App. 48-51.) The district court concluded that even if Rainy Lake did have standing to assert

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[6] DeCaigny and Denne did not purchase fluid milk from any Defendant between May 22, 1992 through May 22, 1996, the time that resulted from the district court's ruling dismissing the fraudulent concealment allegations. (App. 41-42.) All of their purchases were made prior to May 1992.

an antitrust claim, it could not satisfy the "typicality" requirement of Federal Rule of Civil Procedure 23 because, as a convenience store in a rural area of northern Minnesota that sold fluid milk and assorted sundries, it was dissimilar from other class members. (App. 50-54.)

Because the district court dismissed all but one named plaintiff, and ruled that the remaining plaintiff lacked standing and denied leave to add additional plaintiffs, Petitioners moved for entry of final judgment in order to make a timely appeal. Respondents moved for summary judgment against Rainy Lake. The district court granted the motions on August 17, 1998 (App. 53-54), and final judgment was entered the same day (App. 55).

IV. Court of Appeals Proceedings

On November 15, 1999, the Eighth Circuit affirmed. The court first determined that it did not have appellate jurisdiction because no Petitioner had a "stake" in the litigation, an issue that neither Petitioners nor Respondents ever raised on appeal. In re Milk Prods. Antitrust Litig., 195 F.3d at 434-35. Because appellate jurisdiction had not been argued, the court elected to review only three of the seven issues raised on appeal. The court first affirmed the dismissal of Rainy Lake's individual claim on the basis that under state law, not federal common law, Rainy Lake impliedly sold its antitrust claim when it assigned certain business assets. Id. at 436. Next, the court affirmed the denial of class certification on the basis that Rainy Lake, the only remaining named class plaintiff, had no standing. Additionally, the court held that the district court did not abuse its discretion in denying class certification because Rainy Lake, even if it had standing, was not a "typical" purchaser of the price-fixed product because it was geographically isolated, purchased only small amounts of

the price-fixed product at wholesale prices, and was a convenience store, not a large grocery store. Id. at 436-37. Lastly, the court affirmed the district court's decision to preclude amendment of the complaint to add additional class representatives. The court determined that Petitioners failed to show good cause to amend the Rule 16 schedule, despite the expiration of amendment deadlines over a year earlier and before the district court's dispositive decisions. Id. at 438. Nowhere in its opinion did the Eighth Circuit discuss the dismissal of the fraudulent concealment[7] allegations or the dismissal of K&P (which, if reviewed and reversed, would have revived claims of the other Petitioners here) or acknowledge it dismissed on procedural grounds a significant antitrust action containing sworn admissions of activity that violated the Sherman Act.

REASONS FOR GRANTING THE WRIT

I. The Court of Appeals' Opinion Purports to Rely on Supreme Court Precedent to Hold that a Plaintiff Forever Loses its Stake in a Litigation Before its Right to Appeal Matures.

The Eighth Circuit Court of Appeals concluded that an antitrust plaintiff in a class action context whose claim is dismissed because the sole defendant from which it purchased is dismissed forever loses its stake in the litigation and is foreclosed from appealing underlying orders for any purpose.

[7] A more concise and practical pleading nomenclature should be "concealed conspiracy," rather that "fraudulent concealment of a conspiracy." "Fraudulent concealment" is an impossible factual pleading standard in a horizontal price-fixing conspiracy case without the opportunity to conduct adequate discovery to determine the factors establishing the concealment of the conspirators' actions, at least where the pleadings show a prima facie showing of concealment.

In re Milk Prods. Antitrust Litig., 195 F.3d 430, 434-35 (8th Cir. 1999). This decision purportedly relied upon Supreme Court precedent established in Deposit Guaranty Nat'l Bank v. Roper, 445 U.S. 326 (1980), and has altered constitutional notions of standing, the grant of power to the federal courts of appeal, and a party's right to seek redress set forth in the Federal Rules of Appellate Procedure in the class action context. See U.S. Const. Art III, § 2 (the federal courts' power to decide a case or controversy); 28 U.S.C. § 1291 (Congress vested power in the court of appeals for review of final decisions); and Fed. R. App. P. 4 (an appeal of right may only be taken from a final judgment). Under Rule 10(c) of this Court, a Writ should issue to establish whether a class action plaintiff loses its stake to challenge substantive rulings directly affecting its claim and procedural rulings governing class certification at the time when an unappealable order of partial judgment is entered.

It is now black letter law that to qualify as a case fit for federal court adjudication, a litigant must have an interest to support a finding that an actual case or controversy is present throughout the entire course of the litigation. This Court's opinion in Roper identified two such interests in the class action context: 1) an interest in the individual substantive claim; or 2) an interest in employing the procedural class action device to pursue individual claims. Roper, 445 U.S. at 331. This Court did not find these interests to be inviolate. This Court instructed that a party could lose its interest if it had received all that it was entitled to by way of judgment or settlement or if its time to appeal a ruling had run. Id. at 333-34. However, if the settlement or judgment were involuntarily thrust upon a plaintiff in the class action context, this Court specifically held that the plaintiff still had a stake in appealing

a denial of class certification even if it no longer had any substantive interest in the underlying action. Id. at 340.

The Eighth Circuit completely ignored both the reasoning and the holding of Roper to hold that a substantive ruling and dismissal against a class action plaintiff forever extinguishes its stake in the litigation. Hoffman Corner Oil had an interest in the merits of its individual claim and class certification. It is undisputed that Hoffman Corner Oil did not settle its claim. It is also beyond dispute that Hoffman Corner Oil's time to appeal had not yet arisen, much less run, because judgment was not final. What is never enunciated by the Eighth Circuit, and is further confused by its reliance on Roper, is how or when Hoffman Corner Oil could challenge a partial judgment and preserve is "stake" in the litigation prior to the district court's ruling on class certification.

At the time of the district court order for partial judgment, Hoffman Corner Oil sought interlocutory review. The district court refused, effectively placing Hoffman Corner Oil in procedural limbo. Hoffman Corner Oil was prevented from claiming it was a proper class representative because the sole defendant from which it purchased had been dismissed. Federal Rule of Appellate Procedure 3 prevented it from appealing until a final judgment on all issues against all parties was entered. And now, the Eighth Circuit found that by waiting, Hoffman Corner Oil lost its stake in the litigation.

This Court's guidance is necessary to determine if a class action plaintiff's stake in the substantive and procedural outcome of a case is extinguished before a right to appeal is triggered. This Petition provides the opportunity for this Court to enunciate the extent of a party's stake in class action litigation following a non-appealable, partial judgment. Such a decision will ensure harmony with the Constitution, the federal court enabling statutes, and the Federal Rules of

Appellate Procedure and ensure that a class action plaintiff's stake in the litigation can never be extinguished prior to a final ruling on substantive rulings effecting its individual claims and on procedural rulings concerning its right to invoke the procedural mechanism of a class action.

II. The Court of Appeals' Opinion Creates a Circuit Conflict on Whether State or Federal Law Governs the Standing of a Direct Purchaser to Assert an Antitrust Claim Following the Assignment of Defined Business Assets.

The Eighth Circuit Court of Appeals concluded that whether a direct purchaser who asserts an antitrust claim following the assignment of certain business assets has standing to maintain an antitrust action is determined by the individual laws of the fifty states. In re Milk Prods. Antitrust Litig., 195 F.3d at 435-36 ("In general, we see little need for federal common law to govern this issue of contract law"). This decision creates a conflict with the First and Third Circuit Courts of Appeal, both of which have held that the assignment of a federal antitrust claim is a matter of federal, not state, law. See Sullivan v. National Football League, 34 F.3d 1091, 1106 (1st Cir. 1994), cert. denied, 513 U.S. 1190 (1995); Lerman v. Joyce Int'l, Inc., 10 F.3d 106, 112 (3d Cir. 1993); Gulfstream III Assocs. v. Gulfstream Aerospace Corp., 995 F.2d 425 (3d Cir. 1993). Under Rule 10(a) of this Court, a Writ should issue to resolve this important question of the application of multiple and perhaps conflicting state laws to determine standing in federal Sherman Act cases.

In creating this circuit conflict, the Eighth Circuit swept aside well-settled law from other circuits on alleged factual differences. Regardless of any factual differences, however, the Eighth Circuit's holding on assignments of antitrust claims

cannot be reconciled legally or factually with cases from other circuits. For example, the Third Circuit has held that whether an individual or entity validly assigned antitrust claims to another is a question to be resolved by federal common law, not state law. Gulfstream III Assocs., 995 F.2d at 437-38 (noting that state law determinations would not be appropriate because assignments may implicate the "direct purchaser" rule of antitrust injury). Likewise, the First Circuit has held that because of the unique nature of antitrust claims, these claims are not assigned unless *express* language accompanies any purported assignment. Sullivan, 34 F.3d at 1106. 1994; see also Gulfstream III Assocs., 995 F.2d at 438-40 (discussing the "direct purchaser" rule's effect on the assignment of antitrust claims); Lerman, 10 F.3d at 112 (affirming the Gulfstream requirement of "express" assignment, and holding that express assignment included language "all causes of action, claims and demands of whatsoever nature"); Knott v. McDonald's Corp., 147 F.3d 1065, 1068 n.4 (9th Cir. 1998) (noting the "unique concerns underlying antitrust assignments").

According to the sale documents in this case, there was no express assignment of Rainy Lake's antitrust claims and Rainy Lake retained its standing to sue Respondents in this action.[8] See Sullivan, 34 F.3d at 1106 (finding the contract language "all other assets" did not assign the plaintiff's antitrust claim to the buyers); Gulfstream III Assocs., 995

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[8] The Eighth Circuit chastised plaintiffs for allegedly agreeing to have the issue of standing resolved on an "abbreviated record." In re Milk Prods. Antitrust Litig., 195 F.3d at 435 n.4. Because the Rainy Lake asset sale documents did not contain an *express* assignment of its antitrust claims, submitting the question of standing on the sale document alone was proper and the court of appeals clearly erred in resolving the factual question. This violation of the Seventh Amendment is discussed separately in this Petition as another basis for granting the Writ.

F.2d at 431, 440 (holding that the plaintiff's general assignment of "all of its rights, title and interest in and to the [G-III] and the Purchase Agreement" did not include its antitrust claims); Martino v. McDonald's Sys., Inc., 432 F. Supp. 499, 504 (N.D. Ill. 1977) (holding that the assignment of "all rights, title and interest of all assets, tangible and intangible" in a McDonald's franchise did not assign antitrust claims); aff'd, 598 F.2d 1079 (7th Cir.), cert. denied, 444 U.S. 966 (1979); see also Lerman v. Joyce Int'l, Inc., 10 F.3d 106, 112 (3d Cir. 1993) (finding the assignment of "all of" the plaintiff's "causes of action, . . . claims and demands of whatsoever nature" included RICO claims, which must be expressly assigned like antitrust claims).

This Court's guidance is necessary to resolve this conflict in the circuits. Its analysis and decision regarding whether state or federal law controls the federal standing of an antitrust plaintiff who assigns certain assets will have national significance and will impact the public policy of private enforcement of the antitrust laws in the United States. This Petition provides the opportunity for the Court to ensure that a direct purchaser of a price-fixed product, who subsequently assigns assets but not expressly an antitrust or other cause of action, maintains standing to assert the violation of the Sherman Act. Such a decision will promote uniform federal antitrust enforcement policy and ensure harmony with this Court's decision in Reiter v. Sonotone Corp., 442 U.S. 330, 344 (1979) (private antitrust class actions, including suits commenced on behalf of retail consumers with small claims, provide a "significant supplement" to federal antitrust enforcement and the policy of deterring violations).

III. The Court of Appeals' Opinion Conflicts with this Court's Opinion on Whether the Claims of a Purchaser of a "Small Amount" of a Price-Fixed Product is "Typical" under Federal Rule of Civil Procedure 23(a).

The Eighth Circuit Court of Appeals concluded that the antitrust claims of a purchaser of "small wholesale" amounts of a price-fixed commodity in a geographically "isolated" area were not typical of other purchasers in a horizontal price-fixing conspiracy. In re Milk Prods. Antitrust Litig., 195 F.3d at 436-37. This decision conflicts with this Court's decision in Reiter v. Sonotone Corp., 442 U.S. 330, 342-44 (1979), which held that any purchaser of a price-fixed product in a horizontal price-fixing conspiracy is "injured" under the Sherman Act and that any purchaser of such product, consequently, is a typical purchaser. Additionally, the Eighth Circuit's decision contravenes significant public policy issues and case law from every circuit. Under Rule 10(c) of this Court, a Writ should issue to resolve this conflict of the requirement of typicality in federal Sherman Act cases.

This Court has recognized the importance of class actions in enforcing the federal antitrust laws. "Every violation of the antitrust laws is a blow to the free-enterprise system envisaged by Congress. . . . This systems depends on strong competition for its health and vigor, and strong competition depends, in turn, on compliance with antitrust legislation. . . . By offering potential litigants the prospect of a recovery in three times the amount of their damages, Congress encouraged these person to serve as 'private attorneys general.'" Hawaii v. Standard Oil Co., 405 U.S. 251, 265 (1972).

The Eighth Circuit's decision ignores well-settled law from this Court and other circuits on "typicality" under

Federal Rule of Civil Procedure 23. Any entity that purchases any quantity of a price-fixed product has been injured by the conspiracy, and thus is "typical." In re Catfish Antitrust Litig., 826 F. Supp. 1019, 1035 (N.D. Miss. 1993). ("[I]n instances wherein it is alleged that the defendants engaged in a common scheme relative to all members of the class, there is a strong assumption that the claims of the representative parties will be typical of the absent class members.")

None of the perceived factual differences noted by the Eighth Circuit, In re Milk Prods. Antitrust Litig., 195 F.3d 436-37, should prevent a class from being certified.[9] See, e.g., In re South Central States Bakery Prods. Antitrust Litig., 86 F.R.D. 407, 415 (M.D. La. 1980) ("Factual variations between the claims of the class representative and those of some members of the class do not mandate a finding of a lack of typicality where the claims of the class and the representative arise out of the same legal and remedial theory.") Specifically, the fact that Petitioners made purchases pursuant to differing types of contracts is irrelevant. In re Glassine & Greaseproof Paper Antitrust Litig., 88 F.R.D. 302, 305 (E.D. Pa. 1980) (finding that factual differences among methods of purchasing would not affect plaintiffs interests in establishing a conspiracy to fix prices, and observing "Plaintiffs allege that prices were set at non-competitive levels: such market conditions would affect the prices paid by both types of purchasers, and their interests would be congruent."); see also In re Potash Antitrust Litig., 159 F.R.D. 682, 690-91 (D. Minn. 1995). ("Although the

[9] This is especially true where, as here, no merits discovery was allowed. This and a litany of other Seventh Amendment violations committed by the Eighth Circuit are discussed infra at 27-28.

Plaintiffs admittedly purchased potash in smaller quantities and were not privy to special high volume discounts available to their larger counterparts, Rule 23(a)(3) does not require that all members of a proposed class pay the same amount or use similar purchase methods in order to pursue an antitrust price-fixing claim. Similarly, Rule 23(a)(3) does not require that the representative plaintiffs to have the same claim size or financial interest as the class they seek to represent. Courts have routinely held that 'small' claim size will not prohibit class certification.")

Likewise, courts have uniformly found that the geographic location of a plaintiff is not relevant to determining "typicality." In re Master Key Antitrust Litig., 70 F.R.D. 23, 26 n.4 (D. Conn. 1975) ("That such facts as that some of the representative plaintiffs are located in eastern cities while members of the class are located in the plains states are irrelevant if they do not have significance under one of the other clauses of rule 23.") The court of appeals swept aside these long-standing notions of typicality.

The Court's guidance is necessary to determine whether a plaintiff who purchases a modest amount of a price-fixed product, and is located in a non-metropolitan area, fails to satisfy the "typicality" requirement of the Federal Rules of Civil Procedure. This Petition affords the Court an opportunity to apply the public policies, enunciated in Hawaii v. Standard Oil Co., to the narrow but significant issue of who is a "typical" purchaser in the context of a class action under the federal antitrust laws. Because smaller purchasers are the ones typically to step up to the plate and assert antitrust claims, the Eighth Circuit's holding seriously jeopardizes private enforcement of federal antitrust statutes.

In addition, this case would allow the Court to harmonize the law of the Eighth Circuit with public policy by finding

that the claims of *any* plaintiff who has been injured as a result of the purchase of a price-fixed product is a typical purchaser.

IV. The Court of Appeals Compartmentalized Petitioners' Evidence in Contravention of this Court's Opinion in *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962).

The Eighth Circuit Court of Appeals initially lists seven issues raised by Petitioners on appeal and then states "our resolution of the first three issues ends the case, and we will not address the others." (App. 60). Its failure to address the entire case on appeal and the piecemeal treatment of the case by the district court below conflicts with this Court's teachings in Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690 (1962). "The plaintiffs should be given the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each." Id. at 699. Moreover, "[t]he character and effect of a conspiracy are not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole." Id. at 698-99 (quoting United States v. Patten, 226 U.S. 525, 544 (1911)).

Here, the court of appeals totally ignored its obligation to look at Petitioners' claims as a whole, particularly the wrongful dismissal of Respondent K&P (Polka Dot Dairy) in the face of incontrovertible evidence that it participated in the conspiracy.

> . . . Those discussions took place between Marigold Foods, myself and people who we've talked about before at the Dairy Freshes when they were by themselves and Land O'Lakes and Polka Dot [Polka Dot is the d/b/a of K&P Companies] and

> Oak Grove and whomever the other suppliers were. . . .

(Doyle I at 48-49, A-379). Doyle identified principals Dick Cook and Wally Petit of K&P as participants in the price fixing conspiracy. (Id. at 32-33; A-363-69.) And yet in face of these clear statements made under oath that K&P were co-conspirators in the conspiracy to fix the price of milk, the court of appeals chose to ignore the issue of the district court's wrongful dismissal of K&P on the pleadings.

Futhermore, the appellate court's compartmentalization manifest most egregiously in its failure to consider whether the district court improperly dismissed Petitioners' fraudulent concealment allegations. Here, the court of appeals briefly mentioned Klehr v. A.O. Smith Corp., 521 U.S. 179 (1997), a case limited on its face to RICO actions.[10] Petitioners alleged specifically they were unable to discover Respondents' unlawful conduct until 1996, when Doyle's information of antitrust violations became known. (A-48-49.) Petitioners also alleged specifically how Respondents concealed the conspiracy, including falsely attributing price increases to market forces, paying "hush money" to an executive to keep him silent, participating in secret meetings where no record of price-fixing activities were kept, and acquiescing to all actions taken by the conspirators (A-54.) While district and court of appeals cases have historically endorsed such allegations satisfied the pleading standards of fraudulent concealment, see, e.g., City of Tuscaloosa v. Harcros Chemicals, Inc., 158 F.3d 548, 573 n.43 (11th Cir. 1998), cert. denied, 120 S. Ct.

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[10]The district court's dismissal of the fraudulent concealment allegations was based on non-horizontal price-fixing decisions. (App. 15.) This Court's direction is needed and presents a case to develop a brightline rule as requested by Justice Scalia's concurring opinion in Klehr.

309 (1999); In re Nasdaq Market Makers Antitrust Litig., 169 F.R.D. 493, 520 (S.D.N.Y. 1996); Catfish, 826 F. Supp. at 1031, the Eighth Circuit instead erroneously cited Klehr and observed these allegations were insufficient.

Plainly, the requirements of Continental Ore were not met in this case. Petitioners pleaded and alleged that Respondents entered into a conspiracy to fix, raise, maintain and stabilize the price of fluid milk sold to the putative class members. They pleaded the conspiracy and the concealment by Respondents of their actions and Petitioners' due diligence in attempting to discover the concealment of the conspiracy. The evidence and sworn statements of Doyle, one of the architects and engineers of the conspiracy, indicated that the conspiracy was ongoing and that he received the last payment of his "hush money" contract in January 1994. (Id. at 11; A-342.)

The complaints below were filed in May 1996, well within the four-year limitation period. 15 U.S.C. § 15b. Further, the concealment issue here would *only* relate to whether damages could be recovered for a period in excess of the Clayton Act four-year limitations period, as the cause of action would have accrued in an ongoing horizontal price fixing conspiracy case within that period.

Both the district court and the court of appeals failed to consider the case as a whole, ignored the clear evidence of the Doyle statements and instead fashioned a dismissal by a piecemeal dissection of the case, thereby exalting form over substance. If, for instance, K&P was wrongfully dismissed on the pleadings by the district court, then Hoffman Corner Oil would be a proper class representative, even under the district court's flawed "geographical" and "value of purchase" criteria, as it is a metropolitan purchaser of hundreds of thousands of dollars of product within the four-year limitations period.

However, as a result of the court of appeals' piecemeal treatment of the matter, it never reached the issue of whether the district court's dismissal of Petitioners' fraudulent concealment allegations or K&P as a defendant was improper, requiring this Court's review.

V. The Court of Appeals' Decision Violates the Seventh Amendment of the United States Constitution by Making Findings of Fact on Questions within the Province of a Jury.

Both the court of appeals and the district court made factual determinations that invaded on the province of a jury mandated by the Seventh Amendment of the Constitution of the United States. U.S. Const. amend. VII. Specifically, the district court, *inter alia*, assumed the following factual predicates:

a) that the intent of the contracting parties in the Rainy Lake matter. The appellate court is in error in that objections were made to and no time was afforded for Petitioners to make a record as no merit discovery was allowed by the trial court. (App. 63-64.)
b) that the affirmative acts of concealment alleged, if proven to a jury, would satisfy the standards as to a fraudulent concealment of the conspiracy.
c) that K&P Company (Polka Dot Dairy) was *not* a co-conspirator in face of the clear evidence of Doyle to the contrary.
d) that K&P (Polka Dot) and its principals Cook and Petit were *not* members of the conspiracy.
e) that in dismissing the Petitioners' claim of fraudulent concealment against Respondents, the district court either had to find the sworn

admission of Doyle to be untrue or simply had to ignore it.

Each of these factual elements were highly relevant to the decision of the court of appeals. Review is warranted.

CONCLUSION

This Petition affords this Court an opportunity to correct the decision of the Eighth Circuit that thwarts the long-standing mandate announced in Agency Holding Corp. v. Malley-Duff & Associates, Inc., 483 U.S. 143, 151 (1987):

> Both RICO and the Clayton Act are designed to remedy economic injury by providing for the recovery of treble damages, costs, and attorney's fees. Both statutes bring to bear the pressure of "private attorneys general" on a serious national problem for which public prosecutorial resources are deemed inadequate; the mechanism chosen to reach the objective in both the Clayton Act and RICO is the carrot of treble damages. Moreover, both statutes aim to compensate the same type of injury; each requires that a plaintiff show injury "in his business or property by reason of a violation."

This Court must call up this case and examine it under its de novo standards. Lacking this, there will remain a chilling effect on the enforcement of the antitrust laws of the United States by "private attorneys general" and the bar in general. The plain errors of law, denial of meaningful discovery in a patently obvious horizontal price-fixing case should not be countenanced by this Court. This case also will allow the Court to draw a bright line on the legal ledger of antitrust law enforcement and to facilitate disgorgement of the alleged illegal profits reaped from this price-fixing ring.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

IN RE MILK PRODUCTS ANTITRUST LITIGATION

Master File Civil No. 3-96-458

PRETRIAL SCHEDULE

This Document relates to All cases,

Pursuant to Rule 16, Federal Rules of Civil Procedure, and in order to secure the just, speedy, and inexpensive determination of this action, the following schedule shall govern these proceedings. The schedule may be modified only upon formal motion and a showing of good cause as required by Local Rule 16.3.

1. All pre-discovery disclosures required by Rule 26(a)(1) shall be completed on or before August 20, 1996. The period during which the parties may conduct discovery shall terminate on Dec. 30, 1997. Disputes with regard to pre-discovery disclosures or discovery shall be called immediately to the Court's attention by the making of an appropriate motion, and shall not be relied upon by any party as a justification for not adhering to this pretrial schedule;

2. All motions which seek to amend the pleadings or add parties must be filed and the hearing thereon completed on or before Feb. 1, 1997;

3. All other nondispositive motions, specifically those which relate to discovery and the discovery period, shall be filed and served prior to Dec. 30, 1997. All nondispositive motions shall be scheduled for hearing by calling Mary

Lenner, Secretary for Magistrate Judge Jonathan G. Lebedoff. All nondispositive motions shall be scheduled, filed, and served in compliance with Local Rule 7.1(a). A total of fifteen minutes will be allotted to each party who appears to present argument on the motion. The moving party may reserve up to five of the fifteen minutes for rebuttal. No discovery motion shall be heard unless the moving party files with the motion the statement required by Local Rule 37.1 and complies with the requirements of Local Rule 37.2;

4. No more than 100 interrogatories (counted in accordance with Local Rule 33.1) shall be served by any party as a group;

5. No more than 100 depositions (excluding expert depositions) shall be taken by any party as a group without prior order of the court;

6. That within the foregoing period allotted for discovery, but no later than the dates set forth below, the parties shall retain and disclose to opposing counsel all persons they intend to call as expert witnesses at trial. Each party's disclosure shall identify each expert and state the subject matter on which the expert is expected to testify. The disclosure shall be accompanied by a written report prepared and signed by the witness. As required by Fed.R.Civ.P. 26(a)(2)(B), the report shall contain:

a. The qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years;

b. The compensation to be paid for the study and testimony;

c. A listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years;

d. A complete statement of all opinions to be expressed and the basis and reasons therefor;

e. The data or other information considered by the witness in forming the opinions; and

f. Any exhibits to be used as a summary of or support for the opinions.

The Plaintiff's disclosures shall be made on or before Oct. 1, 1997.

The Defendant's disclosures shall be made on or before Nov. 1, 1997.

7. The parties do contemplate taking expert depositions. No more than 5 experts may be deposed by each party as a group without prior order of the court;

8. Each party shall fully supplement all discovery responses every month as necessary. Any evidence responsive to a discovery request which has not been disclosed on or before that date, except for good cause shown, shall be excluded from evidence at trial;

9. All dispositive motions shall be filed and the hearing thereon completed prior to March 1, 1998. All dispositive motions shall be scheduled, filed and served in compliance with Local Rule 7.1(b). Counsel are forewarned that six to eight weeks advance notice is necessary to place a dispositive motion on the calendar;

10. This case shall be ready for trial on Oct. 1, 1998, at which time the case will be placed on the court's jury trial calendar.

DATED: August 23, 1996.

/s/

Paul A. Magnuson
United States District Court Judge

Discovery Cut-off
__12-30-97_____
Non-Disp.Motions
___12-30-97_____
Disp. Motion Ends
_3-1-98_____
Trial Date
__10-1-98_____

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

IN RE MILK PRODUCTS ANTITRUST LITIGATION Master File No. 3-96-458

This document relates to:

All Actions

PRETRIAL ORDER NO. 4

This matter is before the Court upon the motions to dismiss filed by Marigold Foods, Inc.; Marigold Venture, Inc.; BolsWessanen U.S.A., Inc.; BolsWessanen Holdings, Inc.; Land O'Lakes, Inc.; Schroeder Brothers, Inc.; and Meyers Bros. Dairy, Inc. on behalf of all Defendants. Specifically, Land O'Lakes, Inc. moved to dismiss the fraudulent concealment allegation set forth in the First Amended and Consolidated Class Action Complaint and to dismiss its internal operating unit, Country Lake Foods, based on its lack of capacity to be sued. Marigold Foods, Inc. moved to dismiss both substantive counts contained in Plaintiffs' complaint. BolsWessanen U.S.A., Inc. and BolsWessanen Holdings, Inc. filed their own motions to dismiss for lack of personal jurisdiction or, in the alternative, for summary judgment, as well as joining in the motion to dismiss filed by Marigold Foods, Inc. Marigold Ventures, Inc. also joined in Marigold Foods, Inc.'s motion to dismiss. Schroeder Brothers, Inc. moved to dismiss, relying on the supporting

memoranda filed by Marigold Foods, Inc. BolsWessanen U.S.A., Inc. filed a motion for leave to file a reply affidavit. Meyers Bros. Dairy, Inc. untimely filed a motion to dismiss, which the Court declined to consider at this time. The Court also did not hear argument on Marigold Foods, Inc.'s motion for a protective order staying all merits discovery or Plaintiffs' motion to compel production of documents.

Based on the entire record and the arguments of the parties and for the reasons articulated at oral argument on this matter,

IT IS HEREBY ORDERED THAT:

1. Land O'Lakes, Inc.'s Motion to Dismiss the Fraudulent Concealment Allegation in Plaintiffs' First Amended and Consolidated Complaint (Clerk Doc. No. 20) is GRANTED;

2. Land O'Lakes, Inc.'s Motion to Dismiss its Internal Operating Unit, Country Lake Foods, Based on its Lack of Capacity to be Sued (Clerk Doc. No. 42) is GRANTED;

3. Schroeder Brothers, Inc.'s Motion to Dismiss (Clerk Doc. No. 46) is GRANTED;

4. BolsWessanen U.S.A., Inc.'s Motion to Dismiss or, in the Alternative, for Summary Judgment (Clerk Doc. No. 60) is DENIED;

5. BolsWessanen Holdings, Inc.'s Motion to Dismiss or, in the Alternative, for Summary Judgment (Clerk Doc. No. 61) is DENIED;

6. Marigold Foods, Inc.'s Motion to Dismiss (Clerk Doc. No. 67) is GRANTED;

7. BolsWessanen U.S.A., Inc.'s Motion for Leave to File Reply Affidavit (Clerk Doc. No. 79) is GRANTED;

8. The First Amended and Consolidated Class Action Complaint (Clerk Doc. No. 14) is DISMISSED WITHOUT

PREJUDICE WITH LEAVE TO FILE AN AMENDED COMPLAINT;

9. Such Amended Complaint shall be filed no later than January 31, 1997; and

10. Defendants shall file an answer to the Amended Complaint, or otherwise plead, no later than March 14 1997.

Dated: December 26, 1996

/s/
Paul A. Magnuson
United States District Court Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

IN RE MILK PRODUCTS ANTITRUST LITIGATION Master File No. 3-96-458

This document relates to:

All Actions

PRETRIAL ORDER NO. 7

This matter is before the Court upon multiple motions by both Defendants and Plaintiffs. Defendants Marigold Foods, Inc., Meyer Brothers Dairy, Inc., and Schroeder Milk Company, Inc. have filed Motions to Dismiss, pursuant to Federal Rule of Civil Procedure 12(b)(6), for failure to state a claim upon which relief can be granted. Defendants Land O'Lakes, Inc., Oak Grove Dairy, Inc., Marigold Venture, Inc., K&P Company, Inc., BolsWessanen Holdings, Inc., and BolsWessanen U.S.A., Inc. all join in the Motion to Dismiss. Defendant Land O'Lakes, Inc. has filed a Motion to Dismiss the fraudulent concealment allegations of Plaintiffs' Second Amended Complaint, and all remaining Defendants join in this motion. Plaintiffs have renewed a Motion to Compel Defendants' production of documents. Finally, Defendants BolsWessanen Holdings, Inc. and BolsWessanen U.S.A., Inc. have filed a Motion to Dismiss, pursuant to Rule 12(b)(2), for lack of personal jurisdiction. For the following reasons, Defendants' Motion to Dismiss under Rule 12(b)(6) is granted

with respect to Defendant K&P Company and denied with respect to all other Defendants, Defendants' Motion to Dismiss the fraudulent concealment claims is granted, Plaintiffs' Motion to Compel is denied in part and granted in part, and Defendants BolsWessanen Holdings' and BolsWessanen U.S.A.'s Motion to Dismiss for lack of jurisdiction is denied with leave to renew the motion at a later date.

BACKGROUND

On May 22, 1996, Plaintiffs filed a complaint, which was later amended, alleging that Defendants violated section one of the Sherman Act. Plaintiffs also alleged that Defendants fraudulently concealed their conspiracy and asked that the normal four-year statute of limitations not be applied. On November 22,1996, this Court dismissed Plaintiffs' First Amended Complaint on the grounds that Plaintiffs had failed to provide adequate notice of the factual grounds upon which the conspiracy claim rests because Plaintiffs' allegations were too broad and vague. (See Tr. Civil Mot. Hr'g at 74-75) (Clerk Doc. Nos. 82 & 84). Further, this Court ruled that Plaintiffs failed to properly plead the elements of fraudulent concealment with particularity with respect to each individual Defendant. (See id. at 75-76.) In their Second Amended Complaint ("Complaint"), filed on January 31, 1997, Plaintiffs again allege violations of section one of the Sherman Act and fraudulent concealment. Defendants assert that Plaintiffs' Complaint still does not comply with this Court's November 22 Order.

Plaintiffs allege that each of the Defendants engaged in a conspiracy to fix prices of milk products, in violation of section 1 of the Sherman Act, 15 U.S.C. § 1. (Pls.' Second Am. Compl. ¶ 44.) Specifically, Plaintiffs claim that "discussions and agreements occurred between officers,

agents, and employees of each of the defendants," and that these discussions culminated in fixing the price of milk. (Id. ¶¶ 49-51.) Further, Plaintiffs allege that Defendants agreed to allocate customers and markets. (Id. ¶ 54.) Plaintiffs also allege that Defendants fraudulently concealed their conspiracy, thus requiring the statute of limitations to be extended beyond four years. Defendants claim that Plaintiffs' allegations remain too conclusory and request that this Court dismiss the Complaint.

DISCUSSION

A. Standard of Review

For the purposes of Defendants' Motion to Dismiss, the Court takes all facts alleged in Plaintiffs' Complaint as true. See Westcott v. Omaha, 901 F.2d 1486, 1488 (8th Cir. 1990). Further, the Court must construe the allegations in the Complaint and reasonable inferences arising from the Complaint favorably to Plaintiffs. See Morton v. Becker, 793 F.2d 185, 187 (8th Cir. 1986). A motion to dismiss will be granted only if "it appears beyond doubt that the plaintiff can prove no set of facts which would entitle him to relief." Id.; see Conley v. Gibson, 355 U.S. 41, 45-46 (1957). The Court applies these standards in the following discussion.

B. Conspiracy Allegations

Rule 8 of the Federal Rules of Civil Procedure provides for liberal pleading, requiring only "a short, plain statement of facts sufficient to give the defendant fair notice of the basis of the claim." Five Smiths, Inc. v. National Football League Players Ass'n, 788 F. Supp. 1042, 1048 (D. Minn. 1992) (quoting Fusco v. Xerox Corp., 676 F.2d 332, 337 n.7 (8th Cir. 1982); see also Baxley-Delamar Monuments, Inc. v.

American Cemetery Ass'n, 843 F.2d 1154, 1156 (8th Cir. 1988). These liberal pleading rules are as equally applicable to federal antitrust claims as they are to any other claim. See Baxley-Delamar, 843 F.2d at 1156. In the antitrust conspiracy context, however, general allegations of a conspiracy will not suffice; the claim must include a statement of "the facts constituting the conspiracy, its object and accomplishment." Five Smiths, Inc., 788 F. Supp. at 1048 (quoting Fusco, 676 F.2d at 337 n.7). This Court notes that in the antitrust area, courts are especially reluctant to grant dismissals for failure to state a claim. See Great Atl. & Pac. Tea Co. v. Amalgamated Meat Cutters & Butcher Workmen of N. Am., 410 F.2d 650, 653 (8th Cir. 1969); see also Hospital Bld'g Co. v. Trustees, 425 U.S. 738, 746 (1976) (stating that "in antitrust cases, where 'the proof is largely in the hands of the alleged conspirators,' dismissals ... should be granted very sparingly") (citations omitted).

In its earlier ruling on Plaintiffs' First Amended Complaint, this Court held that the allegations in Plaintiffs' complaint were too vague and thus failed to provide adequate notice to Defendants of the factual grounds underlying the price fixing claim. (See Tr. Civil Mot. Hr'g at 75.) To successfully withstand a motion for dismissal, Plaintiffs' price-fixing claim must include the following allegations: "(1) the existence of an agreement, combination or conspiracy, (2) among actual competitors...(3) with the purpose or effect of 'raising, depressing, fixing pegging or stabilizing... price[s]...' (4) in interstate...commerce." Five Smiths, Inc., 788 F. Supp. at 1048 (quoting Cayman Exploration Corp. v. United Gas Pipe Line Co., 873 F.2d 1357, 1361 (10th Cir. 1989)). While Plaintiffs' Complaint fails to satisfy these requirements with respect to Defendant K&P Company, Inc. ("K&P"), the Complaint sufficiently alleges a price-fixing conspiracy among the remaining Defendants.

1. Existence of Agreement

Under the Sherman Act, Plaintiffs must allege a "'contract, combination...or conspiracy' in restraint of trade." Quality Mercury, Inc. v. Ford Motor Co., 542 F.2d 466, 469 (8th Cir. 1976). A combination is created if more than unilateral action is involved; thus, it is not necessary to plead a formal agreement between the competitors. Id. Plaintiffs allege that Defendants furthered their "agreement" by "discussing and agreeing on the prices they would charge for milk and milk products." (Pls.' Second Am. Compl. ¶ 49.)

Plaintiffs' allegations with respect to K&P fail on this first prong because the allegations fail to allege that K&P participated in any sort of agreement with the other Defendants. Aside from the fraudulent concealment allegations, which will be discussed later, K&P is mentioned in only one other paragraph of the Complaint. Plaintiffs allege that K&P furthered the conspiracy "by engaging in illegal pricing discussions in person and by telephone with the other defendants and unnamed co-conspirators," illegally allocated customers, and illegally enforced compliance with the conspiracy. (Pls.' Second Am. Compl. ¶ 83.) Such allegations are too vague to place K&P on notice of the factual grounds of the claims against it. While the allegations against the other Defendants list specific actions taken by the companies, the allegations against K&P attempt to lump K&P in with the other defendants simply by alleging that K&P communicated with them. Because these allegations fail to provide adequate notice to K&P, the claims against K&P must be dismissed.

The Complaint specifically indicates how each remaining individual Defendant participated in the alleged agreement. For example, Plaintiffs allege that Marigold Foods, Inc. ("Marigold Foods") and Marigold Venture, Inc. ("Marigold Venture") agreed to give Defendant Schroeder Milk Co.

("Schroeder") a contract for bottling milk in exchange for Schroeder agreeing not to engage in price competition or compete for additional customers. (Id. ¶ 56.) Further, Plaintiffs allege that the St. Cloud market was allocated to Defendant Oak Grove Dairy, Inc. ("Oak Grove") as long as Oak Grove agreed not to compete for another market. (Id. ¶ 57.) Further, Plaintiffs allege that Defendants prevented independent sales entities from selling milk to markets already allocated to Defendants Meyer Brothers Dairy, Inc. ("Meyer"), Oak Grove, and Schroeder. As to Defendants BolsWessanen U.S.A., Inc. ("U.S.A.") and BolsWessanen Holdings, Inc. ("Holdings"), Plaintiffs allege that both Defendants acquiesced in and approved of the actions of its subsidiaries, Marigold Foods and Marigold Venture. Id. ¶¶ 70-71.) Finally, Plaintiffs allege that Defendant Land O'Lakes, Inc. ("LOL") engaged in pricing discussions with the other Defendants, "including an employee of...Marigold Foods...and an officer and employee of...Meyer," and refused to bottle milk for competitors who were not involved in the conspiracy. (Id. ¶ 73.) While these examples are not an exhaustive list of the allegations made in the Complaint, they are sufficient to illustrate that each individual Defendant mentioned above has been alleged to be involved in a conspiracy.

A contract, combination or conspiracy may be shown simply by alleging that the competitors' conduct was "joint or collaborative," and should be judged by the Defendants' words and actions. Quality Mercury, 542 F.2d at 469. In the present case, Plaintiffs have alleged that Defendants, other than K&P, acted in a joint or collaborative way by allocating markets and engaging in pricing discussions. These allegations are sufficient to meet the requirements of section one of the Sherman Act.

2. Among Competitors

Plaintiffs must also allege that the anti-competitive conduct is occurring among actual competitors. See Five Smiths, Inc., 788 F. Supp. at 1048. Plaintiffs allege that all Defendants are "engaged in the business of producing, marketing and selling milk and milk products throughout the five-state area." (Pls.' Second Am. Compl. ¶¶ 17-28.) As Defendants are all engaged in the same business within the same market, Plaintiffs have sufficiently alleged conduct among competitors.

3. Purpose or Effect of Raising or Fixing Prices

The Sherman Act also requires that a plaintiff allege that the purpose of a contract, combination or conspiracy is to raise, lower, fix or stabilize prices. See Five Smiths, Inc., 788 F. Supp. at 1048. Plaintiffs allege that Defendants would agree among themselves to increase the price of milk products or agree to uniformly reduce prices, resulting in a fixed, stabilized price. (Pls.' Second Am. Compl. ¶ 46.) Further, Plaintiffs allege that Defendants' conspiracy actually resulted in raised and stabilized prices which substantially eliminated competition. (Id. ¶ 86.) These allegations meet the requirements of section one of the Sherman Act because they allege that Defendants' conduct did have the purpose or effect of raising or fixing prices.

4. Interstate Commerce

Finally, the Sherman Act requires Plaintiffs to allege that Defendants' conspiracy involved products within interstate commerce. Plaintiffs allege that Defendants produce or purchase milk and milk products for distribution in a five-state area (including Minnesota, Wisconsin, Iowa, North

Dakota, and South Dakota). (Id. ¶¶ 7, 39-41.) Defendants' business activities are thus alleged to have a substantial effect on interstate commerce. (Id. ¶ 42.) Therefore, Plaintiffs have sufficiently alleged that Defendants' conduct involved products within interstate commerce.

In summary, Plaintiffs have alleged all of the elements necessary to make out a violation of section one of the Sherman Act with respect to all Defendants besides K&P. Plaintiffs have further enumerated specific acts of each of these Defendants which are alleged to be violations of the Act. Accordingly Plaintiffs have met the liberal pleading requirements of Rule 8 with respect to the Sherman Act conspiracy claims, and these claims should not be dismissed. However, Defendant K&P must be dismissed from this action because the allegations against it are too broad or vague to satisfy Rule 8.

C. Fraudulent Concealment Allegations

While Rule 8 generally contains liberal pleading rules, an allegation of fraudulent concealment must be pled with substantially more detail. Rule 9(b) requires "averments of fraud" to be stated with particularity, Fed. R. Civ. P. 9(b), including the "time, place and content of the false misrepresentations, the fact misrepresented and what was retained or given up as a consequence of the fraud." Firestone v. Firestone, 76 F.3d 1205, 1211 (D.C. Cir. 1996) (quoting Kowal v. MCI Communications Corp., 16 F.3d 1271, 1278 (D.C. Cir. 1994); see also Hunt v. Magnell, 758 F. Supp. 1292, 1298 (D. Minn. 1991). To toll the four-year statute of limitations on grounds of fraudulent concealment, Plaintiffs must establish three elements: (1) Defendants' concealment of Plaintiffs' cause of action, (2) failure by Plaintiffs to discover the existence of their cause of action, and (3) due diligence by Plaintiffs in attempting to discover the claim. See In re

Wirebound Boxes Antitrust Litig., 128 F.R.D. 262, 266 (D. Minn. 1989) (citing Dayco Corp. v. Goodyear Tire & Rubber Co., 523 F.2d 389, 394 (6th Cir. 1975); Willmar Poultry Co. v. Morton-Norwich Prods., Inc., 1974-2 Trade Cas. (CCH) ¶ 75,292 (D. Minn. 1974). Failure to properly allege any one of these elements is fatal to Plaintiffs' claim.

Plaintiffs continue to assert that only the first two elements are required, and that due diligence is simply an affirmative defense to be raised by Defendants at trial. (See Pls.' Mem. Opp'n at 3.) In support of this assertion, Plaintiffs rely on Kansas City v. Federal Pacific Electric Co., 310 F.2d 271 (8th Cir. 1962). However, a close review of Kansas City reveals that the purported second element of fraudulent concealment — "successful concealment from the injured party" — includes the element of due diligence. Id. at 278 n.9. The Kansas City court indicated that the "statute...will begin to run only from the time the right of action is discovered or, by the exercise of ordinary diligence, might have been discovered." Id.; see also Wood v. Carpenter, 101 U.S. 135, 141 (1879) (stating that a plaintiff "must aver and show that he used due diligence to detect" the claim). Thus, there would be no successful concealment if, by due diligence, Plaintiffs should have discovered their cause of action. Moreover, the Supreme Court recently reinforced the importance of due diligence in a fraudulent concealment claim. In Klehr v. A.O. Smith Corp., the Court stated that "a plaintiff who is not reasonably diligent may not assert 'fraudulent concealment.'" __U.S.__, 117 S. Ct. 1984, 1993 (1997). While the Klehr decision was limited to the context of civil RICO, the Court noted that antitrust cases support the requirement of due diligence and that no antitrust cases state the contrary. See id. Therefore, the Court stands by its earlier ruling that due diligence is a required element of a fraudulent concealment claim. An analysis of Plaintiffs' Complaint leads to the conclusion that Plaintiffs have failed to plead each

of the elements of fraudulent concealment with sufficient particularity, and, thus, the claim for fraudulent concealment must be dismissed.

1. Defendants' Concealment of the Cause of Action

Plaintiffs claim that they did not discover the existence of their antitrust claim against Defendants until May 1996. (Pls.' Second Am. Compl. ¶ 92.) Moreover, Plaintiffs allege that discovery prior to this time was impossible because of Defendants' concealment of their illegal activity. (Id.) However, Plaintiffs must make "specific allegations of affirmative acts taken solely to conceal a price fixing conspiracy." In re Wirebound, 128 F.R.D. at 266. In the present case, Plaintiffs allege that instead of admitting to a conspiracy, Defendants attributed their high profits to diversified operations, improved efficiency, drought, tight supplies, and state law. (Pls.' Second Am. Compl. ¶ 92.) Plaintiffs further allege that Defendants publicly denied price fixing allegations, participated in "clandestine meetings" at which price fixing was discussed, and silently acquiesced to the conspiracy. (Id. ¶¶ 94, 98-99.) Simply denying the existence of an antitrust violation does not constitute fraudulent concealment, and to hold otherwise "would effectively nullify the statute of limitations in these cases." Pocahontas Supreme Coal Co. v. Bethlehem Steel Corp., 828 F.2d 211, 218-19 (4th Cir. 1987); see also In re Aluminum Phosphide Antitrust Litig., 905 F. Supp. 1457, 1470 (D. Kan. 1995); Ecodyne Corp. v. Guthrie No. Am. Inc., 716 F. Supp. 1132, 1137 (N.D. Ill. 1989). Similar to the present case, the Defendants in Pocahontas attributed the change in prices to factors other than an illegal conspiracy. There, the court held that fraudulent concealment does not result from a mere

failure to own up to illegal conduct, but rather occurs when defendants affirmatively attempt to deflect litigation. Id. 219.

Further, this case is distinguishable from In re Wirebound, upon which Plaintiffs rely. In Wirebound the plaintiffs alleged that the defendants committed specific acts with the sole purpose of concealing a conspiracy. For example, the defendants used plain stationery, circulated a copy of the "rules" of the conspiracy, avoided telephone calls, and labeled correspondence as "personal and confidential." In Re Wirebound, 128 F.R.D. at 266. Further, the plaintiffs alleged that the defendants represented to others that they were conducting trade association meetings when in fact they were meeting in secrecy regarding the conspiracy. Id. The court ruled that these acts were sufficient to infer fraudulent concealment of the conspiracy. Id.

In marked contrast to Wirebound, the Plaintiffs in the present case have not made sufficient allegations of "affirmative acts" of concealment. For example, the mere allegation that Defendants mailed letters to customers attributing price increases to market factors, (See Pls.' Second Am. Compl. ¶ 93), does not lead to the conclusion that Defendants affirmatively concealed a conspiracy, as would a letter on plain stationery meant to conceal the identity of its sender. Similarly, alleging that Defendants participated in "clandestine meetings," (Id. ¶ 99), is not tantamount to representing to others that the meetings were valid trade association meetings when in fact they were meetings in furtherance of a conspiracy. See In re Aluminum Phosphide, 905 F. Supp. at 1470 (dismissing fraudulent concealment claim because plaintiffs failed to cite specific actions by defendants to keep meetings secret). Additionally, alleging that Defendants' silence indicates acquiescence to a conspiracy, (see Pls.' Second Am. Compl. ¶ 98), does not constitute an allegation of an affirmative act of concealment. See In re Aluminum Phospide, 905 F. Supp. at 1470 (holding

that "silence or passive conduct is not fraudulent unless parties' relationship imposes duty to disclose"). Merely claiming that "all conspiracies are self-concealing," (see id. ¶ 92), is simply insufficient.

Nowhere in the Complaint do Plaintiffs allege a specific time that Defendants affirmatively concealed the existence of a conspiracy. The only allegation in Plaintiffs' Complaint which could possibly be construed as an affirmative act is Plaintiffs' claim that Defendant Marigold Foods paid "hush money" to an executive to prevent his alerting the authorities of the conspiracy. (Pls.' Second Am. Compl. ¶ 99.) This payment is said to have taken place "sometime in 1990 or 1991." (Id.) Plaintiffs then attempt to incriminate all other Defendants in this alleged payment by alleging that each of them "approv[ed] of or acquiesc[ed]" in the payments. (Id.) As stated earlier, silent acquiescence does not constitute an affirmative act of concealment. See In re Aluminum Phosphide, 905 F. Supp. at 1470. Further, this specific allegation of Plaintiffs is not pled with particularity. Vaguely alleging that "something" occurred at "sometime" fails to satisfy the particularity requirement. As Plaintiffs have not pled Defendants' acts of concealment with particularity, Plaintiffs have failed to satisfy the first element of fraudulent concealment.

2. Plaintiffs' Failure to Discover Existence of Cause of Action

Even assuming Plaintiffs successfully alleged Defendants' affirmative acts of concealment, Plaintiffs must also allege that this concealment was successful — that is, that as a result of Defendants' concealment, Plaintiffs failed to discover the existence of the antitrust claim. In the present case, Plaintiffs allege that they "could not have discovered" the claim any earlier because "the violations were fraudulently

concealed by defendants." (Pls.' Second Am. Compl. ¶ 92.) Such a claim is circular, and necessarily relies on the success of the concealment allegations. As this Court determined that Plaintiffs failed to properly allege affirmative acts of concealment by Defendants, Plaintiffs may not rely on those allegations to support this element of their claim. See In re Aluminum Phosphide, 905 F. Supp. at 1471 (holding that conclusory allegations that plaintiffs were unaware of the conspiracy is insufficient). Thus, the second element of a fraudulent concealment claim is not adequately pled.

3. Plaintiffs' Due Diligence in Attempting to Discover Claim

Finally, even if Plaintiffs were able to allege affirmative acts of concealment by Defendants resulting in a failure to discover the claim, Plaintiffs' fraudulent concealment claim would still fail because Plaintiffs have not alleged due diligence. Instead, Plaintiffs continue to assert that due diligence is not an element of fraudulent concealment, and that Defendants bear the burden of proving Plaintiffs' failure to exercise due diligence. (See Pls.' Mem. Opp'n at 3-5.) However, as discussed earlier and as this Court noted in its previous ruling, due diligence is an established element of fraudulent concealment. (See Tr. Civil Mot. Hr'g at 75) (noting that Plaintiffs failed to explain when or how the discovery of their claim was made and why it was not made sooner).

In Wood v. Carpenter, the Supreme Court held that parties alleging fraudulent concealment "must aver and show that [they] used due diligence to detect it, and if [they] had the means of discovery in [their] power, [they] will be held to have known it." Wood v. Carpenter, 101 U.S. at 140. Thus, any activities which would create notice and "excite attention" will require inquiry on the part of Plaintiffs; merely

asserting that they have diligently pursued their claims is not a sufficient allegation. See Dayco Corp. v. Goodyear Tire & Rubber Co., 523 F.2d 389, 394 (6th Cir. 1975) (stating that a "mere allegation of due diligence without asserting what steps were taken is insufficient under the Wood standard"); In re Aluminum Phospide, 905 F. Supp. at 1471; Berkson v. Del Monte Corp., 743 F.2d 53, 56 (1st Cir. 1984). Plaintiffs here assert that they did not become aware of any facts to excite their attention until May 1996. However, as this Court noted in its previous Order, the Justice Department announced investigations of Defendants in July 1995. Plaintiffs claim that Defendants' denials of wrongdoing following this announcement amounted to fraudulent concealment. (Pls.' Second Am. Compl. ¶ 98.) As established earlier, such denials do not constitute fraudulent concealment. Plaintiffs' Complaint also states that the effect of Defendants' alleged conspiracy was that milk prices were "raised and stabilized. . . and price competition was substantially eliminated." (Id. ¶ 86.) This fact alone would seem to excite attention and thus put Plaintiffs on inquiry notice. Aside from indicating the date when they became aware of their claim, Plaintiffs failed to answer the questions this Court posed in its previous Order. No explanation is made of the steps Plaintiffs used to discover their claim, nor do Plaintiffs explain why the facts underlying their claim were not available to them at an earlier date. As a result, Plaintiffs have failed to sufficiently allege their due diligence in pursuing their claim. As Plaintiffs have failed to properly plead with particularity each of the elements of their fraudulent concealment claim, the Court must dismiss Count IX of Plaintiffs' Complaint.

D. Land O'Lakes's Successor in Interest and Majority Owner Liability

Plaintiffs' Complaint lists as a defendant, LOL, "individually and as a successor in interest to Country Lake Foods, Inc. and Dairy Fresh, Inc." In its November 22 Order, this Court dismissed Country Lake Foods as a defendant based on the fact that the corporation had been dissolved more than three years prior to the filing of Plaintiffs' first complaint in this case. (See Tr. Civ. Mot. Hr'g at 72.) Plaintiffs now allege that both Country Lake Foods and Dairy Fresh were participants in a conspiracy with other Defendants from 1988 to 1991, and from 1985 to 1990, respectively. (Pls.' Second Am. Compl. ¶¶ 21-22.) Plaintiffs note that Country Lake Foods acquired Dairy Fresh in 1989 and that LOL acquired the minority, publicly-held interest in Country Lake Foods in 1991. (Id.) The only alleged act of either of the above two "subsidiaries" is a claim that Country Lake Foods fraudulently concealed the conspiracy by publicly claiming that the high price of milk was due to factors other than a conspiracy. (Id. ¶ 92.) As discussed earlier, such a claim does not amount to fraudulent concealment. Further, the alleged conspiratorial acts of Country Lake Foods and Dairy Fresh occurred more than four years prior to the filing of Plaintiffs' Complaint. Because Plaintiffs have failed to properly plead fraudulent concealment, the statute of limitations would bar a claim based on these actions. Nowhere else does the Complaint attribute any illegal acts to either company. Accordingly, it is difficult for this Court to contemplate exactly what LOL would be liable for under a theory of successor in interest or majority owner liability. If the companies themselves are not accused of any wrongdoing, it follows that their parent corporation can not be vicariously liable.

Further, even if Country Lake Foods and Dairy Fresh had engaged in illegal acts within the statute of limitations period,

Plaintiffs have failed to properly plead the elements of successor liability. Minnesota statutory law provides for transferee liability, but "only to the extent provided in the contract or agreement between the transferee and the transferor." Minn. Stat. § 302A.661. Plaintiffs' Complaint does not allege that LOL agreed to assume any liability of either Country Lake Foods or Dairy Fresh. In addition, in only four circumstances will a court make an exception to the statutory rule regarding transferee liability: (1) when the successor corporation expressly or impliedly agreed to assume such liabilities; (2) when the acquisition amounts to a merger of the corporations; (3) when the successor corporation is merely a continuation of the purchased corporation; and (4) when the purpose of the transaction is to fraudulently escape liability for debts. See Niccum v. Hydra Tool Corp., 438 N.W.2d 96, 98 (Minn. 1989); see also Cooper v. Lakewood Eng'g & Mfg. Co., 45 F.3d 243, 245 (8th Cir. 1995) (applying Minnesota law). Rather than allege one of these exceptions in their Complaint, Plaintiffs rely on the mere fact that LOL acquired Country Lake Foods and Dairy Fresh to establish successor liability. While Plaintiffs do bring up theories of "de facto merger," "mere continuation," and "substantial continuation" in their brief, these theories are not supported by a single allegation in the Complaint. The same can be said for Plaintiffs' request that this Court disregard corporate formalities and "pierce the veil" of LOL. Assuming all of the facts in Plaintiffs' Complaint are true, none would serve as a basis for imposing successor liability upon LOL. Consequently, the Court concludes that Plaintiffs' claims against LOL as majority owner and as a successor in interest to Country Lake Foods and Dairy Fresh must be dismissed.

E. Motion to Compel Discovery

Plaintiffs have also made a motion to compel the production of documents by Defendants. Plaintiffs state that they have requested three categories of documents: those already compiled by Defendants in response to subpoenas from the Antitrust Division of the United States Department of Justice ("grand jury documents"), documents regarding sales and pricing that have been provided to the State of Minnesota, and documents regarding milk and milk product economic data that have been provided to third parties. Defendants object to all three categories of documents.

1. Grand Jury Documents

Plaintiffs' Request No. 1(a) asks for documents submitted by Defendants to the grand jury or agencies investigating potential violations by Defendants. Defendants object to the grand jury documents request on the basis that it is unduly burdensome and not reasonably calculated to lead to admissible evidence. Further, Defendants claim that the grand jury documents would not parallel the issues of the present action, and that Rule 6(e) of the Federal Rules of Criminal Procedure protects this information from discovery. Plaintiffs' Request No. 1(b) asks for documents relating to the destruction of documents requested by the grand jury or investigative agencies. Defendants deny the existence of any such documents.

Defendants' argument that the production of the grand jury documents would be unduly burdensome is weak at best. Given the fact that these documents were previously compiled for the grand jury, it would not seem to pose much difficulty to gather them together once again. However, Defendants remaining two arguments have merit. First, Defendants claim that these documents do not parallel the issues in Plaintiffs'

Complaint. At this early stage in this case, Defendants may well be correct in this assertion. Considering the large volume of documents at issue, it would be premature to order their production when they may have no bearing on the case. Furthermore, it is highly probable that these grand jury documents will duplicate those documents produced in response to Plaintiffs' second and third requests.

Finally, this Court agrees that Rule 6(e) protects such documents. Rule 6(e) prohibits persons from disclosing material occurring before the grand jury. Fed. R. Crim. P. 6(e). The Supreme Court has recognized that in order for grand jury proceedings to function properly, secrecy must be maintained. See Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211, 218 (1979). The policy behind such secrecy is to protect from disclosure "only the essence of what takes place in the grand jury room, in order to preserve the freedom and integrity of the deliberative process." In re Grand Jury Proceedings Relative to Perl, 838 F.2d 304, 306 (8th Cir. 1988) (citing United States v. Proctor & Gamble Co., 356 U.S. 677, 681-82 (1958)). The standard for determining whether the secrecy of a grand jury may be broken is a showing that the material sought is necessary to avoid a possible injustice, that the need for disclosure outweighs the need for continued secrecy, and that the request covers only those materials meeting the above two tests. See Douglas Oil Co., 441 U.S. at 221-22. This standard applies even if the grand jury has concluded its investigation because courts must consider the effect that granting the request may have on future grand juries. See id. at 222. Further, the burden of showing this "particularized need" rests on the party seeking the information. See id. at 223. Finally, the ultimate decision of whether to grant such a motion is within the discretion of the court. See id. at 223, 228 ("Generally we leave it to the considered discretion of the district court to determine the proper response to requests for disclosure under Rule 6(e).").

In their brief supporting the motion to compel discovery, Plaintiffs make no attempt to establish the necessary elements showing particularized need for the grand jury documents. First, Plaintiffs fail to assert that an injustice will result if the documents are not produced. Especially in light of the fact that the same information may be found in documents turned over pursuant to Plaintiffs' other requests, it is not evident that any injustice will result if Plaintiffs' motion to compel is not granted. Second, rather than explain how or why their need for these documents supersedes the need for retaining the grand jury's secrecy, Plaintiffs simply assert that the documents are not covered by Rule 6(e). However, as the Eighth Circuit has noted, revealing the contents of these documents would still reveal "'at the very least, the direction of the grand jury's investigation and the names of persons involved.'" Perl, 838 F.2d at 307 (quoting In re Sealed Case, 801 F.2d 1379, 1381 (D.C. Cir. 1986)). This is true even when the documents may have been prepared for reasons independent of the grand jury investigation. See id. In this case, Plaintiffs make no assertion that the requested documents were produced independently of the grand jury investigation (i.e., the documents may have been created specifically for the grand jury). As such, the logical inference would be that the contents of these documents may tend to reveal the substance of the grand jury proceedings. Moreover, the fact that the grand jury has concluded its investigation does not remove these documents from the reach of Rule 6(e). While it is true that the interest in secrecy may be reduced, a document may still "reveal[] something about the intricate workings of the grand jury itself." Id. at 306. Finally, Plaintiffs have failed to show that their request covers only those documents for which they have shown particularized need. In fact, Plaintiffs have not shown particularized need for any of Defendants' documents. Consequently, Plaintiffs' request is too broad. Because Plaintiffs have not satisfied the

test for turning over grand jury documents, Plaintiffs' motion to compel discovery as to these documents is denied. Additionally, Defendants have stated that no documents exist to satisfy the criteria of Plaintiffs' Request No. 1(b). Therefore, Plaintiffs' motion to compel as to these documents is also denied.

2. Non-Grand Jury Documents

Plaintiffs' second and third requests for documents refer to pricing and market information provided by Defendants to state and federal entities, as well as to other third parties. Defendants object to these requests primarily on the basis that they are not relevant, and that they are vague, overbroad, ambiguous, and unduly burdensome. Defendants further object to the request for information given to third parties on the grounds of attorney-client privilege, the work product doctrine, and joint defense privilege. Rule 26 of the Federal Rules of Civil Procedure allows discovery as to

> any matter, not privileged, which is relevant to the subject matter involved in the pending action.... The information sought need not be admissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

Fed. R. Civ. P. 26(b)(1). This Rule is to be construed broadly and thus encompasses "any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case." Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 351 (1978)(citing Hickman v. Taylor, 329 U.S. 495, 501 (1947)). Defendants cannot reasonably argue that none of these requested documents is relevant to the subject matter of this case or that none could

potentially lead to other relevant matter. Pricing, quantity, and marketing data for milk and milk products surely are relevant to a claim of price-fixing. Thus, to the extent that these documents may lead to discoverable information, Defendants must turn them over.

As for Defendants' claims of privilege, the Court finds them to be unsubstantiated at this point. The party asserting attorney-client privilege bears the burden of establishing the elements of the privilege. See Bouschor v. United States, 316 F.2d 451, 456 (8th Cir. 1963); In re Coordinated Pretrial Proceedings in Antibiotic Antitrust Actions, 1972 Trade Cas. (CCH) ¶ 74,237 (D. Minn. 1971). A blanket statement that a privilege applies simply will not suffice; Defendants must provide this Court with enough information to determine whether the privilege truly applies to each individual document. See FTC v. Shaffner, 626 F.2d 32, 37 (7th Cir. 1980); In re Grand Jury Empanelled Feb. 14, 1978, 603 F.2d 469 (3d Cir. 1979). In the present case, Defendants' objection to discovery is made with such a blanket statement. (See Mem. Supp. Pls.' Mot. to Compel at 5) ("Land O'Lakes further objects ... [on the grounds that it is] protected by the attorney-client privilege, the work product doctrine, [and] the joint defense privilege.") Such a cursory objection fails to provide this Court with the factual background necessary to assess the applicability of the privilege on a document-by-document basis. Accordingly, the Court grants Plaintiffs' Motion to Compel discovery as to Requests Nos. 2 and 3. If Defendants wish to further assert the attorney-client privilege, or any other privilege, they must do so with factual support.

F. Personal Jurisdiction over BolsWessanen

Defendant BolsWessanen U.S.A., Inc. ("U.S.A.") and Defendant BolsWessanen Holdings, Inc. ("Holdings") renew their Motion to Dismiss under Rule 12(b)(2) for lack of

personal jurisdiction, Previously, this Court, pursuant to Rule 56(f), suggested that it would address this issue after discovery went forward. (See Tr. Civil Mot. Hr'g at 73.) While the Order which was entered indicated that the motion was denied, (See Clerk Doc. No. 84), the Court would like to clarify that the motion was denied without prejudice. Therefore, Plaintiffs' argument that the present motion attempts to circumvent this Court's previous ruling is incorrect. However, because Plaintiffs' First Amended Complaint was dismissed, discovery has yet to occur. Consequently, the Court still lacks adequate factual information upon which it can determine the issue of in personam jurisdiction. Therefore, the Motion to Dismiss for lack of personal jurisdiction must be denied with leave to renew the motion at a later date.

G. Product and Geographic Market Definitions

Finally, Defendant LOL contests Plaintiffs' definition of the relevant product and geographic market for this antitrust action. Plaintiffs' Complaint refers to "'milk and milk products'. . . including, but not limited to, fluid milk, fluid milk products and ice cream." (Pls.' Second Am. Compl. ¶ 6.) Additionally, the Complaint indicates that the alleged activities occurred in a five-state area, including "Minnesota, Wisconsin, Iowa, North Dakota, and South Dakota." (Id. ¶ 7.) LOL claims that these definitions are broad and unsupported by any facts. The Court agrees with Plaintiffs that "the relief LOL seeks is premature." (Pls.' Mem. Opp'n Regarding Country Lake Foods at 12.) If necessary, this issue may be addressed at a later date when the Court has more facts before it. Until that time, the Court declines to address it.

CONCLUSION

With the exception of the allegations against Defendant K&P, Plaintiffs' Second Amended Complaint sufficiently identifies the factual grounds underlying Plaintiffs' conspiracy claim and thus provides adequate notice to Defendants. Plaintiffs allege the existence of an agreement among competitors with the purpose or effect of raising or fixing prices in interstate commerce. Therefore, Defendant K&P's Motion to Dismiss is granted, and the remaining Defendants' Motions to Dismiss are denied. Additionally, Plaintiffs' fraudulent concealment claim is not pled with sufficient particularity. Plaintiffs fail to allege Defendants' active concealment of the cause of action, fail to explain why they did not discover the cause of action earlier, and fail to assert their due diligence in attempting to discover the claim. On that basis, the Court dismisses Plaintiffs' fraudulent concealment claim.

Additionally, Plaintiffs' claim against LOL as successor in interest and majority owner of Country Lake Foods and Dairy Fresh must fail. No specific acts of either Country Lake or Dairy Fresh were alleged. Further, any potential acts by either company occurred more than four years prior to the filing of Plaintiffs' claim and are thus barred by the statute of limitations. Therefore, all of Plaintiffs' claims against LOL as successor in interest or majority owner must be dismissed.

As Plaintiffs' Complaint is not being dismissed, it is appropriate for discovery to go forward. Defendants must turn over all relevant documents to Plaintiffs, with the exception of those documents submitted to the grand jury, as they are protected by Rule 6(e) of the Federal Rules of Criminal Procedure. Plaintiffs have failed to show a particularized need for the grand jury documents, and thus their Motion to Compel discovery is denied with respect to

the grand jury documents, but granted with respect to all other requests.

Lastly, the Court determines that it is too early in the proceedings to determine the issues of personal jurisdiction and product and market definitions. First, the Motion to Dismiss for lack of personal jurisdiction is dismissed with leave to renew the motion at a later date. Second, a decision on the relevant product and geographic market definitions would be premature at this point. Therefore, the Court declines to address these issues at this point in time.

Accordingly, **IT IS HEREBY ORDERED** THAT:

1. Defendant K&P Company, Inc.'s Motion to Dismiss (Clerk Doc. No. 92) is GRANTED;

2. Defendant Marigold Foods, Inc.'s Motion to Dismiss (Clerk Doc. No. 91) is DENIED;

3. Defendant Meyer Bros. Dairy, Inc.'s Motion to Dismiss (Clerk Doc. No. 88) is DENIED;

4. Defendant Schroeder Milk Co., Inc.'s Motion to Dismiss (Clerk Doc. No. 97) is DENIED;

5. Defendant Land O'Lakes, Inc.'s Motion to Dismiss the Fraudulent Concealment Allegation (Clerk Doc. No. 89) is GRANTED;

6. Plaintiffs' claims against Defendants alleging fraudulent concealment of the combination or conspiracy, contained in Count IX of the Second Amended Complaint (Clerk Doc. No. 86), are DISMISSED WITH PREJUDICE;

7. Defendants BolsWessanen Holdings, Inc. and BolsWessanen U.S.A., Inc.'s Motion to Dismiss (Clerk Doc. No. 95) is DENIED WITH LEAVE TO RENEW the motion after further discovery; and

8. Plaintiffs' Renewed Motion to Compel (Clerk Doc. No. 140) is DENIED IN PART AND GRANTED IN PART.

Dated: September 30 , 1997

/s/
Paul A. Magnuson
United States District Court Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

IN RE MILK PRODUCTS ANTITRUST LITIGATION,

Civil No. 3-96-458

AMENDED
PRETRIAL SCHEDULE

This Document relates to All Cases

Pursuant to Rule 16, Federal Rules of Civil Procedure, and in order to secure the just, speedy, and inexpensive determination of this action, the following schedule shall govern these proceedings. The schedule may be modified only upon formal motion and a showing of good cause as required by Local Rule 16.3.

1. All pre-discovery disclosures required by Rule 26(a)(1) shall be completed on or before August 20, 1996. The period during which the parties may conduct discovery shall terminate on December 1, 1998. Disputes with regard to pre-discovery disclosures or discovery shall be called immediately to the Court's attention or to the Special Master by the making of an appropriate motion, and shall not be relied upon by any party as a justification for not adhering to this pretrial schedule;

2. All motions which seek to amend the pleadings or add parties must be filed and the hearing thereon completed on or before February 1, 1997;

3. Discovery on class issues shall commence immediately. The deadline for serving and filing Plaintiffs'

Motion for Class Certification shall be February 1, 1998. Discovery on the class certification issue shall conclude on or before March 1, 1998.

4. All other nondispositive motions, specifically those which relate to discovery and the discovery period, shall be filed and served prior to December 1, 1998.

5. No more than 100 interrogatories (counted in accordance with Fed. R. Civ. Pro. 33) shall be served by any party;

6. No more than 100 depositions (excluding expert depositions) shall be taken by any party without prior order of the court;

7. That within the foregoing period allotted for discovery, but no later than the dates set forth below, the parties shall retain and disclose to opposing counsel all persons they intend to call as expert witnesses at trial. Each party's disclosure shall identify each expert and state the subject matter on which the expert is expected to testify. The disclosure shall be accompanied by a written report prepared and signed by the witness. As required by Fed.R.Civ.P. 26(a)(2)(B), the report shall contain:

a. The qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years;

b. The compensation to be paid for the study and testimony;

c. A listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years;

d. A complete statement of all opinions to be expressed and the basis and reasons therefor;

e. The data or other information considered by the witness in forming the opinions; and

f. Any exhibits to be used as a summary of or support for the opinions.

The Plaintiff's disclosures shall be made on or before August 1, 1998.
The Defendant's disclosures shall be made on or before September 1, 1998.

7. The parties do contemplate taking expert depositions. No more than 5 experts may be deposed by any party without prior order of the court;

8. Each party shall fully supplement all discovery responses every month as necessary. Any evidence responsive to a discovery request which has not been disclosed on or before that date, except for good cause shown, shall be excluded from evidence at trial;

9. All dispositive motions shall be filed prior to February 1, 1999. All dispositive motions shall be scheduled, filed and served in compliance with Local Rule 7.1(b). Counsel are forewarned that six to eight weeks advance notice is necessary to place a dispositive motion on the calendar;

10. This case shall be ready for trial on March 1, 1999, at which time the case will be placed on the court's jury trial calendar.

DATED: October 21, 1997.

/s/

Paul A. Magnuson
United States District Court Judge

Discovery Cut-off
__12-31-98_____
Non-Disp.Motions
___12-31-98_____
Disp. Motion Ends
_2-1-99_____
Trial Date
__3-1-99_____

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

IN RE MILK PRODUCTS ANTITRUST LITIGATION,

Civil No. 3-96-458
SECOND AMENDED
PRETRIAL SCHEDULE

This Document Relates to All Cases:

Pursuant to Rule 16, Federal Rules of Civil Procedure, and in order to secure the just, speedy, and inexpensive determination of this action, the following schedule shall govern these proceedings. The schedule may be modified only upon formal motion and a showing of good cause as required by Local Rule 16.3.

1. All pre-discovery disclosures required by Rule 26(a)(1) shall be completed on or before August 20, 1996. The period during which the parties may conduct discovery shall terminate on December 1, 1998. Disputes with regard to pre-discovery disclosures or discovery shall be called immediately to the Court's attention by the making of an appropriate motion, and shall not be relied upon by any party as a justification for not adhering to this pretrial schedule;

2. All motions which seek to amend the pleadings or add parties must be filed and the hearing thereon completed on or before February 1, 1997;

3. Discovery on class issues shall commence immediately. Merits discovery shall commence after class certification matters have been completed. The deadline for

serving and filing Plaintiffs' Motion for Class Certification shall be February 1, 1998. Discovery on the class certification issue shall conclude on or before March 1, 1998.

4. All other nondispositive motions, specifically those which relate to discovery and the discovery period, shall be filed and served prior to December 1, 1998.

5. No more than 100 interrogatories (counted in accordance with Fed. R. Civ. Pro. 33) shall be served by any party;

6. No more than 100 depositions (excluding expert depositions) shall be taken by any party without prior order of the court;

7. That within the foregoing period allotted for discovery, but no later than the dates set forth below, the parties shall retain and disclose to opposing counsel all persons they intend to call as expert witnesses at trial. Each party's disclosure shall identify each expert and state the subject matter on which the expert is expected to testify. The disclosure shall be accompanied by a written report prepared and signed by the witness. As required by Fed.R.Civ.P. 26(a)(2)(B), the report shall contain:

a. The qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years;

b. The compensation to be paid for the study and testimony;

c. A listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years;

d. A complete statement of all opinions to be expressed and the basis and reasons therefor;

e. The data or other information considered by the witness in forming the opinions; and

f. Any exhibits to be used as a summary of or support for the opinions.

The Plaintiff's disclosures shall be made on or before August 1, 1998.

The Defendant's disclosures shall be made on or before September 1, 1998.

8. The parties do contemplate taking expert depositions. No more than 5 experts may be deposed by any party without prior order of the court;

9. Each party shall fully supplement all discovery responses every month as necessary. Any evidence responsive to a discovery request which has not been disclosed on or before that date, except for good cause shown, shall be excluded from evidence at trial;

10. All dispositive motions shall be filed prior to February 1, 1999. All dispositive motions shall be scheduled, filed and served in compliance with Local Rule 7.1(b). Counsel are forewarned that six to eight weeks advance notice is necessary to place a dispositive motion on the calendar;

11. This case shall be ready for trial on March 1, 1999, at which time the case will be placed on the court's jury trial calendar.

DATED: February 3, 1998.

/s/

Paul A. Magnuson
United States District Court Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

IN RE MILK PRODUCTS ANTITRUST LITIGATION, Civil File No. 3-96-458

MEMORANDUM AND ORDER

This document relates to:

All Actions

PRETRIAL ORDER NO. 10

This matter is before the Court upon Plaintiffs' Motion for Class Certification and Motion to File Third Amended Complaint, and upon Defendants' Motion for Partial Summary Judgment and Motion for Sanctions. For the following reasons, Plaintiffs' motions are denied. Defendants' Motion for Partial Summary Judgment is granted, and Defendants' Motion for Sanctions is denied.

BACKGROUND

This case arises from Plaintiffs' allegations that Defendants engaged in a conspiracy to artificially inflate the price of milk and milk products. Plaintiffs filed their initial Complaint on May 22, 1996, and later amended that Complaint. On November 22, 1996, this Court dismissed

Plaintiffs' First Amended Complaint on the grounds that Plaintiffs had failed to provide adequate notice of the factual grounds upon which the conspiracy claims rest. (See Tr. Civil Mot. Hr'g at 74-75) (Clerk Doc. Nos. 82 & 84.) This Court also ruled that Plaintiffs failed to properly plead the elements of fraudulent concealment with particularity with respect to each individual Defendant. (See id. at 75-76.)

Plaintiffs then filed a Second Amended Complaint on January 31, 1997. There, Plaintiffs again alleged violations of the Sherman Act and fraudulent concealment. Again, this Court ruled that Plaintiffs failed to adequately plead the elements of fraudulent concealment and dismissed with prejudice count IX of Plaintiffs' Second Amended Complaint. (See In Re Milk Prods. Litig., Civ. File No. 3-96-458 (D. Minn. Sept. 30,1997) (order granting in part motion to dismiss). Additionally, Defendant K&P Company was dismissed because Plaintiffs did not allege the necessary elements of a conspiracy violation. (See id. at 9.)

From the commencement of this action, Plaintiffs have indicated their intention to move to certify a class. To that end, Plaintiffs' Second Amended Complaint includes eight named plaintiffs to serve as class representatives. However, for various reasons, Plaintiffs now withdraw seven of these named Plaintiffs. Two of the named Plaintiffs, Gerald Bukstein, f/k/a Sol's Superette, and Robinson Enterprises of Worthington, d/b/a Plaza 66, no longer wish to serve as class representatives due to time commitments. (See Pls.' Mem. Supp. Mot. Third Am. Compl. at 6.) Two other named Plaintiffs, Thomas DeCaigny, d/b/a DeCaigny Grocery, and Stan Denne, d/b/a Denne's Market and Roseville Superette, are inappropriate representatives because they did not purchase milk during the relevant time period resulting from this Court's order dismissing the fraudulent concealment claims. (See id.) Additionally, Plaintiff Hoffman Corner Oil Company, Inc. only purchased milk from now-dismissed

Defendant K & P Company, and should be dismissed. Moreover, Plaintiff Magic City Cakes, Inc. no longer fits within the proposed relevant geographic area and, thus, should be dismissed. Finally, Plaintiff The LittleStore did not purchase milk directly from any of the Defendants; thus, this named Plaintiff is also being withdrawn as a class representative. Defendants contend that the time for voluntary dismissal has passed, and therefore request that these Plaintiffs be dismissed via summary judgment.

Defendants also move for sanctions against Plaintiffs' attorneys. According to Defendants, Plaintiffs' attorneys were aware that several of the named Plaintiffs were not adequate class representatives. Yet Defendants were required to go to the expense of deposing these witnesses to learn of those inadequacies. Additionally, Defendants incurred costs for producing documents regarding all milk products in the five-state area, even though Plaintiffs now request a narrower class definition which includes only the state of Minnesota.

Plaintiffs also wish to file a Third Amended Complaint. This proposed complaint would add three new named Plaintiffs to act as class representatives. Additionally, Plaintiffs wish to modify the proposed class definition, which would limit the class to "entities in the State of Minnesota covered by Federal Milk Marketing Order No. 68" who purchased fluid milk in containers of one half-gallon or more between May 22, 1992, and May 22, 1996. (See Pls.' Mem. Supp. Mot. Third Am. Compl. at 8-9.) Plaintiffs submit that these modifications would cure any potential deficiencies in the named representatives or the proposed class.

If Plaintiffs are not allowed to file a Third Amended Complaint, only one named Plaintiff will remain as a class representative: Rainy Lake One Stop ("Rainy Lake"). Rainy Lake is a small convenience store in northern Minnesota. In 1996, Rainy Lake sold most of its business assets to another party. Nancy Rognerud, the previous owner of Rainy Lake,

stated that she never intended to sell her interest in the present litigation. She also admits that her knowledge of the allegations in this case comes from her attorney. She does not know what the Upper Midwest Milk Marketing Order is. Rognerud also admitted that her business was different from that of large retail grocery stores and restaurants.

DISCUSSION

A. Motion for Partial Summary Judgment

Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. See Fed. R. Civ. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317 (1986); Unigroup, Inc. v. O'Rourke Storage & Transfer Co., 980 F.2d 1217, 1219-20 (8th Cir. 1992). The court determines materiality from the substantive law governing the claim. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). Disputes over facts that might affect the outcome of the lawsuit according to applicable substantive law are material. See id. A material fact dispute is "genuine" if the evidence is sufficient to allow a reasonable jury to return a verdict for the non-moving party. See id. at 248-49.

In the present case, Defendants assert that the seven named plaintiffs which are to be dismissed should be dismissed via summary judgment. Defendants argue that the time for voluntary dismissal under Rule 41(a) of the Federal Rules of Civil Procedure has passed. Rule 41(a) allows a plaintiff to dismiss an action without an order of the court "before service by the adverse party of an answer or of a motion for summary judgment." Fed. R. Civ. P. 41(a)(1). Because Defendants have already served an answer to the Second Amended Complaint, they assert that any dismissal of named Plaintiffs must be done via Rule 41(a)(2), which

requires an order of the court "upon such terms and conditions as the court deems proper." Fed. R. Civ. P. 41(a)(2). .

The parties do not dispute the fact that seven of the named Plaintiffs in the Second Amended Complaint should be dismissed, either because they are not members of the proposed class or because they do not wish to actively pursue the litigation. However, Defendants are correct in their assertion that the dismissal of these parties must be done by order of this Court. Accordingly, pursuant to Rule 41(a)(2), this Court grants summary judgment in favor of Defendants, and the following named Plaintiffs are dismissed from this action: The LittleStore of Minneapolis, Inc.; Magic City Cakes, Inc.; Thomas DeCaigny, d/b/a DeCaigny Grocery; Stan Denne, d/b/a Denne's Market and Roseville Superette; Hoffman Corner Oil Co., Inc.; Gerald Bukstein, d/b/a Sol's Supermarket; and Robinson Enterprises of Worthington, Inc., d/b/a Plaza 66.

B. Motion for Sanctions

Defendants request sanctions, in the form of costs and expenses, for the time Defendants spent preparing an opposition to Plaintiffs' motion for class certification. Defendants assert that sanctions are appropriate because Plaintiffs have admitted that seven of their eight named Plaintiffs are not even in the proposed class. Defendants contend that, following this Court's September 1997 Order dismissing the fraudulent concealment claims, Plaintiffs should have moved to dismiss these Plaintiffs, but instead forced Defendants to depose several of the Plaintiffs. Defendants argue that, had Plaintiffs acted properly, Defendants would have been saved the time and expense of having to establish the inadequacy of each Plaintiff. Thus, Defendants assert that Plaintiffs "unreasonably and unnecessarily multiplied the proceedings in this case and

unnecessarily increased the costs to defendants." (Defs.' Joint Mem. Supp. Mot. for Sanctions at 3.)

Title 28, United States Code, section 1927 provides

> Any attorney ... who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses and attorneys' fees incurred because of such conduct.

28 U.S.C. § 1927. Fees are authorized under this section when an attorney "conduct[s] the litigation in such a manner that escalates costs unnecessarily and vexatiously." Lupo v. R. Rowland & Co., 857 F.2d 482, 486 (8th Cir. 1988).

In the present case, this Court cannot conclude that Plaintiffs have acted unreasonably or vexatiously. While it is true that several of the original named Plaintiffs became ineligible as class representatives, this fact alone does not amount to vexatiousness. Thus, this case is distinguishable from Van Berkel v. Fox Farm & Road Machinery, 581 F. Supp. 1248, 1251 (D. Minn. 1984), in which the plaintiff's attorney was sanctioned because he refused to dismiss his complaint even after he knew the statute of limitations barred the action. Here, once Plaintiffs' attorneys learned that the named Plaintiffs could not represent the class, the attorneys moved to voluntarily dismiss them. Accordingly, this Court holds that Plaintiffs' attorneys did not unreasonably and vexatiously multiply the proceedings, and Defendants' motion for sanctions is denied.

C. Motion to File Third Amended Complaint

Because of the dismissal of seven of the eight named Plaintiffs, Plaintiffs now wish to file a third amended complaint. In this proposed complaint, Plaintiffs list three

additional named class representatives and modify the class definition. Rule 15 of the Federal Rules of Civil Procedure provides

> A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served.... Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires.

Fed. R. Civ. P. 15(a). Thus, Plaintiffs assert that this Court should exercise its broad discretion and grant the motion to amend, particularly since Plaintiffs did not act in bad faith. See Foman v. Davis, 371 U.S. 178, 182 (1962). However, Foman, the very case which Plaintiffs cite in support of their motion to amend, states that one factor to be considered in determining whether to allow an amended complaint is "repeated failure to cure deficiencies by amendments previously allowed." 371 U.S. at 182. It is undisputed that Plaintiffs previously amended their complaint twice.

Additionally, the Second Amended Pretrial Schedule (Clerk Doc. No. 167) states that, "All motions which seek to amend the pleadings or add parties must be filed and the hearing thereon completed on or before February 1, 1997." (Sec. Am. Pretrial Sched. ¶ 2.) Defendants assert that Rule 16 governs because Plaintiffs' motion was filed after the deadline set in the scheduling order. Rule 16(b) provides that "[a] schedule shall not be modified except upon a showing of good cause and by leave of the district judge." Fed. R. Civ. P. 16(b). This good cause standard dictates that the amendment must not be allowed "unless the schedule cannot 'be met despite the diligence of the party seeking the extension.'" Sosa v. Airprint Sys., Inc., 133 F.3d 1417, 1418 (11th Cir. 1998) (citing Fed. R. Civ. P. advisory committee's note). The

Sosa court reasoned that the failure to follow Rule 16 "would render scheduling orders meaningless" and ultimately eliminate the need for the rule itself. Id. at 1419.

The Court agrees. This Court's Scheduling Order explicitly stated the deadline for amending pleadings. Plaintiffs' purported reason for needing to file a third amended complaint is to "address [the] developments" resulting from this Court's previous orders which have "modified [the] contours" of this case. (Pls.' Mem. Supp. Mot. Third Am. Compl. at 1.) Thus, Plaintiffs seem to be asserting that this Court's prior orders which found deficiencies in Plaintiffs' Complaint establish good cause for amending their Complaint. Yet, if this argument were true, all complaints could be amended after dispositive motions were granted. Further, Plaintiffs' memorandum repeatedly cites Rule 15's liberal amendment provisions. Plaintiffs' reliance is misplaced since this Court determines that Rule 16 governs the present situation. However, even if the Rule 15 standard were used, Plaintiffs fail to show why they should be allowed to amend their complaint a third time, after two failed attempts to cure previous deficiencies. Moreover, the Court disagrees with Plaintiffs' assertion that Rule 16 should not apply simply because liability discovery has not yet commenced. The simple fact is that this case was originally filed in May 1996, and Plaintiffs have already twice been allowed to amend their complaint. After this extended amount of elapsed time, Plaintiffs' present realization that their lone named complainant may not qualify as a class representative does not establish good cause. Because Plaintiffs fail to satisfy the good cause requirement of Rule 16, Plaintiffs' motion to file a third amended complaint is denied.

D. Motion for Class Certification

Because this Court grants summary judgment in Defendants' favor, dismissing seven of the eight named Plaintiffs, and because Plaintiffs' motion to file a third amended complaint is denied, only one named Plaintiff remains: Rainy Lake One Stop, Inc. ("Rainy Lake"). Additionally, without a third amended complaint, Plaintiffs are left with their original, broad class definition. However, even assuming Plaintiffs had been allowed to amend their complaint and substitute a narrower class definition, the requirements for class certification still are not met.

Rule 23 of the Federal Rules of Civil Procedure requires that Plaintiffs meet the following criteria for certifying a class:

> (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.

Coleman v. Watt, 40 F.3d 255, 259 (8th Cir. 1994). This Court is allowed discretion in determining whether to certify a class. See Gilbert v. City of Little Rock, Ark., 722 F.2d 1390, 1399 (8th Cir. 1983). Further, Plaintiffs bear the burden of showing that their proposed class satisfies each of Rule 23's requirements. See Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 162(1974); Coleman, 40 F.3d at 258. Defendants challenge Plaintiffs' ability to satisfy the typicality and adequacy requirements of Rule 23. The Court agrees with Defendants that Rainy Lake, the only remaining named Plaintiff, fails to satisfy these requirements.

To be an adequate representative, the named complainant must be a member of the class which it seeks to represent. See Bishop v. Committee on Prof'l Ethics & Conduct, 686 F.2d 1278, 1289 (8th Cir. 1982). Thus, the proposed class representative must possess "the same interest and suffer[] the same injury" as other class members. Id. In the present case, in order to have the same interest and injury as the class, the representative must be within the relevant geographic area and have purchased fluid milk directly from one of the Defendants during the time period between May 22, 1992, and May 22, 1996. Because Rainy Lake sold its assets and no longer operates as a business, it lacks the standing necessary to bring a suit for damages or for injunctive relief. See id. at 1288-89 (holding that a disbarred attorney lacked standing to serve as a class representative for injunctive relief); Vasiliow Co., Inc. v. Anheuser-Busch, Inc., 117 F.R.D. 345, 347 (E.D.N.Y. 1987) (holding that proposed class representative lacked standing to sue for damages or injunctive relief because it did not expressly exempt the cause of action from its sale of business assets).

Rainy Lake does not contest that it is no longer operating a business. Yet Plaintiffs contend that Rainy Lake never intended to sell its right to pursue any litigation. They point to Nancy Rognerud's affidavit, in which she states that Rainy Lake "sold a portion of its assets" which were "certain and specific." (Rognerud Aff. ¶ 5.) Rognerud further states that the sale of assets did not include Rainy Lake's interest in the present lawsuit. (Id. ¶ 6.) This affidavit is directly contradicted by Rognerud's previous deposition testimony, in which she stated that since July 1, 1996, her corporation did not retain any ownership interest in the store. (See Mahon Aff. Ex. A at 20.) The only item which Rognerud testified that her corporation retained was a vehicle. (See id. at 21.)

Further, the Minnesota Supreme Court has listed several factors to be considered to discern if a business as acquired

another business or substantially all of the assets. Among these considerations are "whether the purported successor purchased, leased or assumed the...office equipment, . . . corporate name, . . . inventories, . . . covenant not to compete, . . . possession of premises,... [and] goodwill. Mid-America Festivals Corp. v. Commissioner of Dep't of Econ. Sec., 349 N.W.2d 270, 274 (Minn. 1984). Rognerud admits that her corporation sold the majority of the above items to Rainy Lake's new owner. Moreover, Rognerud's affidavit directly contradicts her prior sworn deposition. This later, self-serving statement cannot be used to support Plaintiffs' motion for class certification. See Camfield Tires, Inc. v. Michelin Tire Corp, 719 F.2d 1361, (8th Cir. 1983) (affidavit which contradicts prior deposition testimony cannot create fact dispute for summary judgment purposes). In truth, this Court agrees with what was stated by Plaintiffs at oral argument on this motion: the issue of potential lawsuits was probably never even considered when Rognerud sold Rainy Lake. However, while Rognerud may not have intended to sell her interest in this lawsuit, she certainly did not expressly retain it either. Under these circumstances, this Court concludes that Rainy Lake is not an adequate class representative because the company is no longer in business, and because it did not retain an interest in this action.

Class certification would also be inappropriate because, even if Rainy Lake did retain an interest in this litigation, its claims are not typical of other class members' claims. Typicality requires that the representative's claims be based on the same or similar grievances as the class members' claims. See Paxton v. Union Nat'l Bank, 688 F.2d 552, 562 (8th Cir. 1982). Additionally, to prove typicality, Plaintiffs must submit more than general conclusory allegations. See id. While Rainy Lake admittedly purchased fluid milk from one of the Defendants (Land O'Lakes, Inc.), its business was that of a convenience store. Thus, Rainy Lake also sold bait

and tackle, gasoline, and other fishing and sporting equipment. Rognerud admitted that Rainy Lake's business was not similar to a restaurant or large supermarket. (See Mahon Aff. Ex. A at 51, 59-60.) Additionally, Rognerud testified that Rainy Lake was not like a Holiday convenience store, because Holiday is owned by a large corporation and probably has more buying power. (See id. at 54.) Yet, those types of businesses would be members of Plaintiffs' proposed class, because they purchased fluid milk during the relevant time period in one-half gallon or larger containers. Moreover, Rainy Lake operates in northern Minnesota and would not be familiar with milk purchasers or Defendants from other areas of the state. Thus, any evidence regarding an alleged conspiracy in Rainy Lake's geographic area would not necessarily translate into evidence of a conspiracy in other regions of Minnesota. Finally, Rainy Lake, as a retailer, would not have claims typical of independent distributers, who also purchase milk from Defendants. Considering all of these factors, this Court concludes that Rainy Lake does not satisfy the typicality requirement for class representation.

Because Rainy Lake fails to satisfy both the adequacy and typicality requirements, it cannot serve as class representative. As no other named plaintiffs remain, Plaintiffs' motion for class certification must be denied. Accordingly, the alternative Rule 23(b)(3) class certification arguments raised by the parties are moot, and the Court does not address them.

CONCLUSION

Plaintiffs' voluntary dismissal of seven of the eight named Plaintiffs must be accomplished by order of this Court via Rule 41(a)(2). Thus, the Court grants summary judgment in favor of Defendants and dismisses those Plaintiffs from this case. Despite the fact that the seven named Plaintiffs were not appropriate class representatives, the Court determines

that Defendants' motion for sanctions must be denied because Plaintiffs did not escalate costs unnecessarily and vexatiously. Further, as Plaintiffs have not shown good cause for why they were not able to amend their Complaint before the deadline listed in the scheduling order, as is required by Rule 16, their motion to file a third amended complaint is denied. Finally, Rainy Lake's shortcomings as a proposed class representative mandate that this Court deny Plaintiffs' motion for class certification.

Accordingly, **IT IS HEREBY ORDERED** THAT:

1. Defendants' Motion for Partial Summary Judgment (Clerk Doc. No. 203) is GRANTED;

2. The following Plaintiffs are dismissed from this case: The LittleStore of Minneapolis, Inc.; Magic City Cakes, Inc.; Thomas DeCaigny, d/b/a DeCaigny Grocery; Stan Denne, d/b/a Denne's Market and Roseville Superette; Hoffman Corner Oil Co., Inc.; Gerald Bukstein, d/b/a Sol's Supermarket; and Robinson Enterprises of Worthington, Inc., d/b/a Plaza 66.

3. Defendants' Motion for Sanctions (Clerk Doc. No. 198) is DENIED;

4. Plaintiffs' Motion to File a Third Amended Complaint (Clerk Doc. No. 212) is DENIED; and

5. Plaintiffs' Motion for Class Certification (Clerk Doc. No. 215) is DENIED.

Dated: July 14, 1998

/s/
Paul A. Magnuson
United States District Court Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

IN RE MILK PRODUCTS ANTITRUST LITIGATION

Civil File No. 3-96-458

ORDER

This document relates to:

All Actions

ORDER

This matter is before the Court upon Defendant's Motion for Summary Judgment and Plaintiff's Motion for Entry of Final Judgment. This Court's July 14, 1998, Order dismissed all Plaintiffs except Rainy Lake One Stop. However, this Court also ruled that Rainy Lake One Stop lacked the standing to bring a suit for either injunctive relief or damages. Thus, both parties now request that this Court formally dismiss Rainy Lake One Stop from this case.

Because there is no dispute as to the propriety of dismissing Rainy Lake One Stop, and because this Court's prior rulings effectively eliminated any possible claims of Rainy Lake One stop, Plaintiffs' and Defendants' motions are granted.

Accordingly, **IT IS HEREBY ORDERED** THAT:

1. Plaintiffs' Motion for Entry of Final Judgment (Clerk Doc. No. 230) is GRANTED;

2. Defendants' Motion for Summary Judgment (Clerk Doc. No. 232) is GRANTED; and

3. Plaintiffs' Second Amended Complaint (Clerk Doc. No.86) is DISMISSED.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: August 17, 1998

/s/
Paul A. Magnuson
United States District Court Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

In Re Milk Products
Antitrust Litigation

Case No. Civil 3-96-458 PAM

Plaintiff

v.

JUDGMENT IN A CIVIL CASE

Defendants

( ) **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

(X) **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that plaintiff's motion for entry of final judgment is granted. Defendants' motion for summary judgment is granted. Plaintiffs' second amended complaint is dismissed.

DATE: August 17,1998

FRANCIS E. DOSAL, CLERK

/s/
Victoria Moralez, Deputy Clerk

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 98-3758

In Re: Milk Products Antitrust Litigation	*	
Rainy Lake One Stop, Inc., et al., on behalf of themselves and all others similarly situated,	*	Appeal from the United States District Court for the District of Minnesota.
Plaintiffs-Appellants,	*	
v.	*	
Marigold Foods, Inc., et al.,	*	
Defendants-Appellees.	*	

Submitted: June 14, 1999

Filed: November 15, 1999

Before RICHARD S. ARNOLD and LOKEN, Circuit Judges, and BYRNE,* District Judge.

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* The HONORABLE WM. MATTHEW BYRNE, JR., United States District Judge for the Central District of California, sitting by designation.

LOKEN, Circuit Judge.

This is an antitrust action commenced as a class action by purchasers of milk and milk products at wholesale. The defendants are milk processors accused of conspiring to fix their wholesale prices in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. After more than two years of discovery and pretrial motions, the district court[1] dismissed the individual claims of the named plaintiffs and denied their motion for class certification. Four named plaintiffs appeal, raising numerous issues. Concluding the district court did not err in dismissing the individual claims of the named plaintiffs, and did not abuse its discretion in denying plaintiffs' motion for class certification and their untimely motion to add more named plaintiffs, we affirm.

I. Background.

On June 24, 1996, seven named plaintiffs filed their first amended class action complaint in which they proposed to represent a class of wholesale purchasers of milk and milk products in a five-State area. To avoid the four-year statute of limitations, see 15 U.S.C. § 15b, plaintiffs alleged that defendants had fraudulently concealed their price fixing conspiracy. On August 23, 1996, the district court entered a pretrial scheduling order, setting a deadline of February 1, 1997, for "[a]ll motions which seek to amend the pleadings or add parties." On December 26, the court dismissed the First Amended Complaint without prejudice on the grounds that the price-fixing allegations were too vague and the fraudulent concealment allegations were factually insufficient. The order permitted plaintiffs to file an amended complaint no later than

[1] The HONORABLE PAUL A. MAGNUSON, Chief Judge of the United States District Court for the District of Minnesota.

January 31, 1997. The court's fraudulent concealment ruling was significant to class certification because some of the named plaintiffs had only purchased milk outside the four-year limitations period.

Plaintiffs filed their Second Amended Complaint on January 31, 1997. The eight named plaintiffs included six of the seven named in the First Amended Complaint, including two whose only milk purchases were outside the limitations period. Defendants promptly moved to dismiss the Second Amended Complaint. In a twenty-eight-page pretrial order, the district court denied those motions, except as to one defendant, K&P Company. However, the court dismissed plaintiffs' fraudulent concealment allegations, rejecting their contention that due diligence in discovering the conspiracy need not be alleged, and concluding that plaintiffs had not sufficiently alleged either their own due diligence or affirmative acts of concealment by defendants. See generally Klehr v. A.O. Smith Corp., 117 S.Ct. 1984, 1993.

Plaintiffs moved for certification of the proposed class on February 1, 1998. In this motion, they reduced the proposed class to all purchasers of fluid milk products in the area covered by the Upper Midwest Milk Marketing Order (FMO 68).[2] After defendants filed briefs opposing class certification, plaintiffs significantly modified their position in three respects. First, they again reduced the proposed class, this time to include all persons who purchased plain milk in half-gallon or larger containers in the Minnesota portion of FMO 68. Second, plaintiffs moved to withdraw seven of the eight named plaintiffs, conceding they were not appropriate

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[2] For a description of federal milk regulation through marketing orders under the Agricultural Marketing Agreement Act of 1937, 7 U.S.C. § 601 *et seq.*, see Minnesota Milk Producers Association v. Glickman, 153 F.3d 632 (8th Cir.1998), cert. denied, 119 S.Ct. 1803 (1999).

class representatives.[3] Third, fourteen months after the district court's deadline for amending pleadings and adding parties, plaintiffs moved for leave to file a Third Amended Complaint adding three new named plaintiffs.

On July 14, 1998, the district court entered a fifteen-page pretrial order disposing of these and other motions. As relevant here, the court first granted plaintiffs' motion to withdraw and dismissed seven named plaintiffs from the case. The court denied plaintiffs' motion for leave to file a Third Amended Complaint, concluding:

> The simple fact is that this case was originally filed in May 1996, and Plaintiffs have already twice been allowed to amend their complaint. After this extended amount of elapsed time, Plaintiffs' present realization that their lone named complainant may not qualify as a class representative does not establish good cause. Because Plaintiffs fail to satisfy the good cause required of [Federal Rule of Civil Procedure] 16, Plaintiffs' motion to file a third amended complaint is denied.

Turning to plaintiffs' motion for class certification, the court found that the sole remaining named plaintiff, Rainy Lake One Stop, Inc. ("Rainy Lake"), had sold its business, including this antitrust claim, and therefore "lacks the standing necessary to bring a suit for damages or for injunctive relief." In addition, the court concluded that Rainy Lake was not an adequate or typical class representative

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[3] Plaintiffs Robinson Enterprises and Gerald Buckstein did not wish to pursue the litigation; Magic City Cakes was outside the reduced geographic area; The Littlestore never purchased directly from any defendant; Thomas DeCaigny and Stan Denne did not purchase within the four-year limitations period; and Hoffman Corner Oil Company purchased only from the dismissed defendant, K&P.

because, as a small convenience store in International Falls, Minnesota, its claim was not typical of large purchasers located elsewhere in the State, such as supermarket and restaurant chains and independent milk distributors. Consequently, the court denied plaintiffs' motion for class certification. One month later, acting on plaintiffs' motion for entry of final judgment, the court confirmed its ruling that Rainy Lake lacked standing to sue, dismissed Rainy Lake's individual antitrust claim, and entered final judgment dismissing plaintiffs' Second Amended Complaint.

On appeal, plaintiffs argue (i) the district court erred in concluding that Rainy Lake lacks standing; (ii) the court abused its discretion in denying class certification; (iii) the court abused its discretion in denying leave to file a Third Amended Complaint; (iv) the court erred in dismissing the fraudulent concealment allegations; (v) the court erred in dismissing defendant K&P; (vi) the court erred in a successor liability ruling regarding defendant Land O' Lakes; and (vii) the court abused its discretion in limiting plaintiffs' discovery of grand jury documents. Our resolution of the first three issues ends the case, and we will not address the others.

II. An Issue of Appellate Jurisdiction.

Four of the eight named plaintiffs filed this appeal, challenging the district court's denial of class certification and their motion to add other named plaintiffs. They argue as though the putative class has appealed. But there is no class, and no absent class member has intervened to participate in the appeal, the procedure upheld in United Airlines, Inc. v. McDonald, 432 U.S. 385, 393-95 (1977). "Federal appellate jurisdiction is limited by the appellant's personal stake in the appeal." Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326, 336 (1980). Accordingly, we must define the limits of appellants' personal stake in this appeal.

In Roper, named plaintiffs appealed the entry of *favorable* money judgments entered on their individual claims after class certification was denied. The Supreme Court held that plaintiffs' "*individual* interest in the litigation--as distinguished from whatever may be their representative responsibilities to the putative class--is sufficient to permit their appeal of the adverse certification ruling." 445 U.S. at 340 (emphasis in the original). By contrast, here the district court dismissed the individual claims of all eight named plaintiffs *on the merits* and then denied class certification. If appellants' individual claims were properly dismissed, they are not members of the putative class, and they have no future stake in the litigation. This question of appellate jurisdiction is important when we come to the issue of whether the district court erred in denying plaintiffs' motion for leave to file a Third Amended Complaint adding new class representatives. If appellants are not members of the class, they have no personal stake in this issue, and we have no jurisdiction to consider it. Therefore, we begin our analysis of the district court's rulings by examining whether appellants' individual claims were properly dismissed.

With their motion for class certification pending, plaintiffs filed a motion to "withdraw" seven of the eight named plaintiffs, including three appellants. The district court granted that motion, explaining:

> The parties do not dispute the fact that seven of the named Plaintiffs in the Second Amended Complaint should be dismissed, either because they are not members of the proposed class or because they do not wish to actively pursue the litigation. However, Defendants are correct in their assertion that the dismissal of these parties must be done by order of this Court. Accordingly, pursuant to Rule 41(a)(2), this Court grants summary judgment in

favor of Defendants, and the following named Plaintiffs are dismissed from this action....

On appeal, plaintiffs do not challenge this portion of the court's order. Accordingly, we summarily affirm the dismissal of appellants Thomas DeCaigny, Stan Denne, and Hoffman Corner Oil Company.

The district court dismissed the individual claim of the fourth appellant, Rainy Lake, for lack of standing. In Part III of this opinion, we affirm that dismissal. In our view, that issue effectively disposes of the appeal, because the lack of a class representative precludes certification of the class proposed by appellants, and because appellants have no remaining personal stake in whether new named plaintiffs should represent an amended class to which they would not belong. However, this question of appellate jurisdiction was not addressed by the parties. Therefore, we will also consider the district court's discretionary orders denying class certification and the motion to add more named plaintiffs.

III. The Dismissal of Rainy Lake's Individual Claim.

Rainy Lake first appeared as a named plaintiff in the Second Amended Complaint filed on January 31, 1997. Months earlier, Rainy Lake had entered into a Standard Purchase Agreement in which it agreed to sell its convenience store premises and substantially all the business assets to unrelated purchasers. The Purchase Agreement listed only tangible assets, but an addendum transferred the business name, "Rainy Lake One Stop," and the store's operating licenses to the buyers, who also assumed on-going testing and well-monitoring obligations imposed on Rainy Lake by the Minnesota Pollution Control Agency. The sale closed on July 1, 1996. The contract documents made no mention of the unasserted antitrust claim in this action. Plaintiffs submitted

to the district court an affidavit by a Rainy Lake shareholder, Nancy Rognerud, averring that "[t]he assets sold did not include Rainy Lake One Stop, Inc.'s law suit." The record does not include testimony by the buyers on this issue.

The district court concluded that Rainy Lake "did not retain an interest in this action" when it sold the convenience store assets:

> Nancy Rognerud's affidavit ... states that the sale of assets did not include Rainy Lake's interest in the present lawsuit. This affidavit is directly contradicted by Rognerud's previous deposition testimony, in which she stated that since July 1, 1996, her corporation did not retain any ownership interest in the store. The only [asset] which Rognerud testified that her corporation retained was a vehicle.

Therefore, the court concluded, Rainy Lake "lacks the standing necessary to bring a suit for damages or for injunctive relief." Plaintiffs challenge that ruling on appeal.

The issue is whether Rainy Lake sold its unasserted and presumably unknown antitrust claim along with its other business assets, a question not addressed in the contract documents. Under Minnesota law, whether a contract is ambiguous is a question for the court. Ambiguities are resolved by ascertaining the intent of the parties from the contract documents and relevant extrinsic evidence. See Republic Nat'l Life Ins. v. Lorraine Realty Corp., 279 N.W.2d 349, 354 (Minn. 1979). Given the evidence of record and the way this issue is presented on appeal, the district court's finding that the parties to the sale of substantially all of Rainy

Lake's business assets intended to include an unknown claim arising out of store operations must be affirmed.[4]

Plaintiffs argue that federal common law governs this issue and creates a presumption against the sale of antitrust claims. Plaintiffs cite cases from other circuits such as Sullivan v. National Football League, 34 F.3d 1091, 1106 (1st Cir. 1994), cert. denied, 513 U.S. 1190, (1995), but those cases involved very different claim transfer issues. In general, we see little need for federal common law to govern this issue of contract law, and no justification for a presumption overriding the contracting parties' intent. Moreover, framing this as an issue of antitrust policy does not help plaintiffs' position. A named plaintiff in a large antitrust class action assumes obligations to the class and a duty to produce its books and records in class action discovery. For a small business such as Rainy Lake, these burdens may be significant, and there is no guarantee that a role as named plaintiff will increase its share of any recovery above what it would receive as an absent class member. If the on-going business has been sold prior to discovery of the antitrust claim, the decision whether to take on these burdens should rest with the buyers.

For the foregoing reasons, the district court's judgment dismissing Rainy Lake's individual claim for lack of standing is affirmed.

IV. The Denial of Class Certification.

Because Rainy Lake's individual claim was properly dismissed for lack of standing, it was not a member of the class and could not represent the class. Because Rainy Lake

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[4] The question of the contracting parties' intent is one of fact. Because plaintiffs did not object to the district court resolving this issue on an abbreviated record, the court's finding as to intent must be upheld unless clearly erroneous.

was the only remaining named plaintiff, the class proposed in the Second Amended Complaint "could not have been properly certified." Bishop v. Committee on Prof'l Ethics, 686 F.2d 1278, 1289 (8th Cir. 1982). Thus, for this reason alone, the order denying class certification must be affirmed. The district court also declined to certify the class on the alternative ground that, even if Rainy Lake retained an interest in the antitrust claim after selling its business assets, it failed to satisfy the typicality and adequacy requirements for a class representative. See Fed.R.Civ.P. 23(a)(3) and 23(a)(4). We affirm on this alternative ground as well.

A district court must "evaluate carefully the legitimacy of the named plaintiff's plea that he is a proper class representative under Rule 23(a)." General Tel. Co. v. Falcon, 457 U.S. 147, 160 (1982). The adequacy and typicality requirements "serve as guideposts for determining whether maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence." Amchem Prods., Inc. v. Windsor, 117 S.Ct. 2231, 2251 n. 20, (1997) (quotation omitted). These issues are committed to the trial court's discretion. "A district court has broad discretion in determining whether to certify a class, and its determination will not be overturned absent a showing that it abused its discretion." Gilbert v. City of Little Rock, 722 F.2d 1390, 1399 (8th Cir. 1983), cert. denied, 466 U.S. 972 (1984).

The district court cited a number of factors in concluding that Rainy Lake was not an appropriate sole representative of the putative class. First, because Rainy Lake operated a small convenience store in northernmost Minnesota, "any evidence regarding an alleged conspiracy in Rainy Lake's geographic area would not necessarily translate into evidence of a conspiracy in other regions of Minnesota." Milk is a perishable and rather bulky product. Defendants introduced

evidence there were at least three regional markets in Minnesota, and only two defendants and a substantial non-defendant dairy operate in northern Minnesota, where Rainy Lake is located. Rainy Lake's location on the perimeter of FMO 68 would be of no concern if there were other named plaintiffs located elsewhere in the class territory. But the district court was legitimately concerned that Rainy Lake's isolated location made it an inappropriate sole representative for this large, State-wide class.

Second, similar concerns are raised by the fact that the Rainy Lake store made only small wholesale purchases at list price. Plaintiffs' antitrust theory is that defendants conspired to fix their list prices of fluid milk. Defendants introduced uncontroverted evidence that many sales to class members were made at cost-plus formula prices unrelated to defendants' list prices. The class might of course be able to prove that defendants' formula prices were inflated by a conspiracy to fix seemingly unrelated list prices. But the relevant question is whether Rainy Lake as sole class representative has a sufficient incentive to represent class members who must prove this additional unlawful effect. Again, that is a legitimate reason to question Rainy Lake's adequacy and typicality. See In re Industrial Diamonds Antitrust Litig., 167 F.R.D. 374, 381 (S.D.N.Y. 1996).

Third, the record casts doubt on Rainy Lake's desire to represent the entire class. Ms. Rognerud testified that she sought to represent only "small convenience stores," not "very large grocery stores" and convenience store chains. A named plaintiff who lacks the desire to "vigorously pursue" the interests of potential class members is not a fair and adequate representative of the class. See Darms v. McCulloch Oil Corp., 720 F.2d 490, 493 (8th Cir. 1983).

Finally, even if Rainy Lake retained some interest in the convenience store's antitrust claim, its sale of the business cuts against its adequacy and typicality as a sole class

representative. Plaintiffs' Second Amended Complaint sought injunctive relief. Rainy Lake is out of business and therefore lacks standing to seek injunctive relief. See City of Los Angeles v. Lyons, 461 U.S. 95, 110-11 (1983); Vasiliow Co., Inc. v. Anheuser-Busch, Inc., 117 F.R.D. 345, 347 (E.D.N.Y. 1987). In addition, Rainy Lake faces the prospect of litigating with the convenience store purchasers over ownership of the antitrust claim, a unique hurdle not faced by other class members. A proposed class representative is not adequate or typical if it is subject to a unique defense that threatens to play a major role in the litigation. See Hanon v. Dataproducts Corp., 976 F.2d 497, 508 (9th Cir. 1992); Gary Plastic Packaging Corp. v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 903 F.2d 176, 179-80 (2d Cir. 1990), cert. denied, 498 U.S. 1025 (1991).

Given Rainy Lake's many typicality and adequacy deficiencies, we cannot say that the district court abused its discretion in refusing to certify the class because Rainy Lake was not a suitable sole representative of the entire class.

V. The Motion to Amend.

Plaintiffs also appeal the district court's order denying as untimely the motion for leave to amend their complaint to add new named plaintiffs. As we explained in Part II of this opinion, we doubt this issue is properly before us. But it has been fully briefed and argued, and it could have been preserved for appeal had an absent class member intervened. So we consider it as an alternative basis to affirm.

We review an order denying leave to amend a complaint for abuse of discretion. See Bell v. Allstate Life Ins. Co., 160 F.3d 452, 454 (8th Cir. 1998). Plaintiffs argue the district court abused its discretion by requiring them to satisfy the good cause requirement under Rule 16(b) instead of considering their motion under the liberal amendment

standards of Rule 15(a). We disagree. When the district court has filed a Rule 16 pretrial scheduling order, it may properly require that good cause be shown for leave to file an amended pleading that is substantially out of time under that order. See Johnson v. Mammoth Recreations, Inc., 975 F.2d 604, 607-08 (9th Cir. 1992). "If we considered only Rule 15(a) without regard to Rule 16(b), we would render scheduling orders meaningless and effectively would read Rule 16(b) and its good cause requirement out of the Federal Rules of Civil Procedure." Sosa v. Airprint Sys., Inc., 133 F.3d 1417, 1419 (11th Cir. 1998).

Plaintiffs further argue they satisfied Rule 16(b)'s good cause requirement because they did not know of the need to add named plaintiffs until September 30, 1997, when the court dismissed K&P and the fraudulent concealment allegations in their Second Amended Complaint. However, the district court did not abuse its discretion in concluding this was an inadequate showing of good cause. The dismissal of the First Amended Complaint in late 1996 should have alerted plaintiffs to their named plaintiff inadequacies; indeed, they timely added two new named plaintiffs in the Second Amended Complaint filed just before the scheduling order deadline. The reasons why seven named plaintiffs were withdrawn demonstrate little care in the selection of adequate and typical class representatives. Finally, plaintiffs did not move to add new named plaintiffs until defendants responded to the motion for class certification. Granting that motion would have required reopening class discovery and further delay, precisely the sort of prejudice that justifies denial of a motion to amend under Rule 15(a). See Bell, 160 F.3d at 454-55. In these circumstances, the district court did not abuse its discretion in denying the motion to amend as untimely.

For the foregoing reasons, the judgment of the district court is affirmed.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT